No. ①

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

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CHARTER PLC,

Petitioner,

v.

MARGE CAMERON, Individually and as Special Administrator of the Estate of J. Bernard Latta, deceased, and ELEANOR PRICE, Individually and as Special Administrator of the Estate of Floyd Price, deceased,

Respondents.

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On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Fourth District

◆

PETITION FOR WRIT OF CERTIORARI

◆

STEPHEN J. MARZEN
Counsel of Record
SHEARMAN & STERLING
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 508-8000

WERNER L. POLAK
STEPHEN FISHBEIN
SHEARMAN & STERLING
599 Lexington Avenue
New York, New York 10022
(212) 848-4000

JOHN E. FREY
DAVID M. SIMON
WILDMAN, HARROLD, ALLEN & DIXON
225 Wacker Drive
Chicago, Illinois 60606
(312) 201-2000

Counsel for Petitioner

192 pp

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OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution permits the exercise of *in personam* jurisdiction over a foreign defendant having no contacts with a forum based solely on attribution to the foreign defendant of the forum contacts of another defendant which is alleged to have conspired with the foreign defendant ("the conspiracy theory of jurisdiction").

2. If the conspiracy theory of jurisdiction is constitutionally viable, whether a complaint's bare allegation that a foreign defendant "conspired" with another defendant with forum contacts provides sufficient basis under the Due Process Clause to permit the exercise of jurisdiction over the foreign defendant based solely on attributed contacts.

PARTIES TO THE PROCEEDINGS BELOW

The following persons or entities were parties to the proceedings in the Illinois Supreme Court and Illinois Appellate Court:

Charter plc

Marge Cameron

Eleanor Price

The following entities are parties to the proceedings in Circuit Court of McLean County, Illinois, but were not parties to the proceedings in the Illinois Supreme Court or the Illinois Appellate Court:

UNARCO Industries, Inc.

Owens-Corning Fiberglas Corporation

Illinois Central Railroad Company

ABEX Corporation

Metropolitan Life Insurance Company

Grefco, Inc.

Cape Industries, PLC

Pittsburgh Corning Corporation

Armstrong World Industries, Inc.

United States Gypsum Company

Sprinkmann Sons Corporation of Illinois

A&M Insulation Co.

STATEMENT PURSUANT TO RULE 29.6

Charter plc is a corporation. Charter plc has no parent corporation and none of its nonwholly owned subsidiaries is publicly traded.

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PETITION FOR WRIT OF CERTIORARI

Charter plc ("Charter") petitions for a writ of certiorari to review the judgment of the Appellate Court of Illinois, Fourth District.

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OPINIONS BELOW

The Illinois Supreme Court's order denying Charter leave to appeal from the judgment of the Illinois Appellate Court (App. 17a) is not reported. The opinion of the Illinois Appellate Court (App. 1a-16a) is reported at 296 Ill. App. 3d 978, 231 Ill. Dec. 55, 695 N.E.2d 572. The Circuit Court's orders (App. 18a-19a) are not reported.

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JURISDICTION

The Illinois Supreme Court's order denying Charter leave to appeal from the judgment of the Illinois Appellate Court was entered on October 6, 1998. (App. 17a.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

◆

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution states the following:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2-209(c) of the Illinois Code of Civil Procedure, 735 ILCS 5/2-209(c), states the following:

> A court may also exercise jurisdiction on any basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States.

◆

STATEMENT OF THE CASE

Each of these consolidated cases presents two distinct splits of authority concerning the so-called "conspiracy theory" of *in personam* jurisdiction. First, the United States Court of Appeals for the Seventh Circuit and the Supreme Courts of Delaware, South Carolina, Iowa, and Minnesota have held – as the Illinois Appellate Court held in these cases – that the Due Process Clause of the Fourteenth Amendment to the United States Constitution permits the exercise of jurisdiction over a non-resident defendant having no contacts with a forum based solely on attribution to that defendant of the forum contacts of another defendant which is alleged to have conspired with the non-resident defendant. This line of authority is directly contrary to a Texas Supreme Court decision rejecting this jurisdictional theory, and conflicts with this Court's decisions (upon which the Texas Supreme Court's decision is based) holding that the Due Process Clause prohibits the exercise of jurisdiction over a non-resident defendant by attributing to that defendant the forum contacts of an associated defendant.

Second, the Illinois Appellate Court held in these cases that a complaint's bare allegation that a foreign defendant "conspired" with another defendant with forum contacts provides sufficient basis under the Due Process Clause to permit the exercise of jurisdiction over the foreign defendant based solely on attributed contacts. This decision is directly contrary to decisions by the United States Courts of Appeal for the First, Sixth, Seventh, Tenth, and D.C. Circuits.

A. The Proceedings Below

In February and March 1995, plaintiffs filed complaints against Charter, a United Kingdom corporation, and several other defendants in the Circuit Court of McLean County, Illinois. (App. 2a-5a.) Each complaint asserts that Charter and the other defendants engaged in a purported conspiracy which allegedly caused plaintiffs to suffer injuries resulting from exposure to asbestos and asbestos-containing materials. (App. 2a-5a.) Under § 2-301 of the Illinois Code of Civil Procedure, a defendant wishing to object to service of process or to the assertion of *in personam* jurisdiction must file a special and limited appearance and a motion to quash or dismiss addressing only those objections before the defendant appears or otherwise addresses any other issue in the case. 735 ILCS 5/2-301.[1] A defendant that proceeds otherwise waives its jurisdictional objections. 735 ILCS 5/2-301. Accordingly, Charter filed in each of these cases a special and limited appearance, a motion to dismiss for lack of *in personam* jurisdiction, and an affidavit attesting to the fact that Charter is incorporated under the laws of the United Kingdom, has its place of business in the United Kingdom, has never had any contacts with Illinois, has never engaged in any aspect of the asbestos business, and has never participated in an asbestos-related conspiracy. (App. 2a-13a, 111a-113a, 116a-121a, 130a-137a.) Charter's motions to dismiss contended, *inter alia*, that the absence of the minimum contacts between Charter and Illinois required by the Due Process Clause precludes the exercise of jurisdiction over Charter by an Illinois court, that the Due Process Clause prohibits the exercise of jurisdiction over Charter based solely on attribution to Charter of the Illinois contacts of alleged co-conspirators, and that even if such a jurisdictional theory is viable, the Due Process Clause bars the exercise of jurisdiction over Charter based solely on the bare allegation that Charter "conspired" with other defendants having Illinois contacts. (App. 2a-13a, 111a-113a, 116a-121a, 130a-137a.)

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[1] Other challenges to *in personam* jurisdiction previously before this Court followed a similar procedural course. *See e.g. Rosenblatt v. American Cyanamid Co.*, 86 S. Ct. 1, 2-3, 15 L. Ed. 2d 39 (1965); *Calder v. Jones*, 465 U.S. 783, 788 fn. 8 (1984).

On April 28, 1997, the Circuit Court denied Charter's motions without written opinion. (App. 18a-19a.) On May 16, 1997, Charter timely filed in the Appellate Court of Illinois, Fourth District, a petition for leave to appeal from the Circuit Court's orders. (App. 43a.) On July 8, 1997, the Illinois Appellate Court granted Charter leave to appeal. (App. 43a.) On appeal, Charter again contended, *inter alia*, that the Due Process Clause prohibits the exercise of jurisdiction over Charter based solely on attribution to Charter of the Illinois contacts of alleged co-conspirators, and that even if such a jurisdictional theory is viable, the Due Process Clause bars the exercise of jurisdiction over Charter based solely on the bare allegation that Charter "conspired" with other defendants having Illinois contacts. (App. 8a-11a, 53a-57a, 60a-61a.)

On May 29, 1997, after consolidating the cases for appeal, the Illinois Appellate Court affirmed the Circuit Court's decision. (App. 1a-16a.) On June 16, 1998, Charter timely filed with the Illinois Appellate Court an affidavit of intent to file with the Illinois Supreme Court a petition for leave to appeal from these rulings, and on June 26, 1998, Charter timely filed with the Illinois Supreme Court a petition for leave to appeal from these rulings. (App. 20a, 22a.) On October 6, 1998, the Illinois Supreme Court denied Charter leave to appeal.[2] (App. 17a.)

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[2] The Illinois Supreme Court's denial of leave to appeal from the decision of the Illinois Appellate Court renders the decision by the Appellate Court both the decision of "a state court of last resort" under Supreme Court Rule 10, and the decision of "the highest court of a State in which a decision could be had" under 28 U.S.C. § 1257(a). *See* Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, and Kenneth S. Geller, Supreme Court Practice, § 3.12-3.13 (7th ed. 1993).

B. The Decision Below

The Illinois Appellate Court held in these cases that "[t]he Illinois long-arm statute encompasses the conspiracy theory of jurisdiction." (App. 10a.)[3] Because the Illinois long arm statute permits Illinois courts to exercise *in personam* jurisdiction to the extent permitted by the Due Process Clause, the Illinois Appellate Court thus effectively held that the Due Process Clause "encompasses the conspiracy theory of jurisdiction." *See* 735 ILCS 5/2-209(c) ("A court may also exercise jurisdiction on any basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States"). The Illinois Appellate Court's decision, although consistent with the decisions of one federal circuit court and four state supreme courts, is at odds with the decision of another state supreme court and, more importantly, with this Court's precedent.

The Illinois Appellate Court also held in these cases that a complaint that alleges "no facts as to how the conspiracy came about, other than that the named conspirators 'conspired,' " provides sufficient basis under the Due Process Clause to permit the exercise of jurisdiction over the foreign defendant based solely on attributed contacts. (App. 11a ("Although the complaints alleged no facts as to how the conspiracy came about, other than that the named conspirators 'conspired,' the allegation is sufficient to overcome a challenge to personal jurisdiction").) This decision is directly contrary to decisions by the United States Courts of Appeal for the First, Sixth, Seventh, Tenth, and D.C. Circuits.

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[3] The Illinois Appellate Court upheld jurisdiction as to Charter based exclusively on plaintiffs' assertion of jurisdiction under the conspiracy theory. The Illinois Appellate Court considered no other basis for jurisdiction over Charter. Indeed, past efforts to assert jurisdiction over Charter on the theory that Charter is responsible for the Illinois contacts of its former subsidiary and alleged *alter ego*, Cape PLC, have been uniformly rejected. *See, e.g., Mohn v. Vermiculite Co.*, 147 Ill. App. 3d 717, 718, 498 N.E.2d 375, 376 (1986) and cases cited at App. 94a-95a. Nor have plaintiffs in this case asserted jurisdiction under an agency theory. Thus, this case squarely presents the issue of the constitutionality of the conspiracy theory of jurisdiction.

Both of these splits of authority warrant review by this Court. Both of the holdings by the Illinois Appellate Court warrant reversal.

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REASONS FOR GRANTING THE PETITION

I. THE ILLINOIS APPELLATE COURT'S ENDORSEMENT OF THE CONSPIRACY THEORY OF JURISDICTION FURTHERS A NATIONAL SPLIT OF AUTHORITY ON THIS ISSUE, CONFLICTS WITH THIS COURT'S DECISIONS, AND EVISCERATES THE DUE PROCESS CLAUSE'S MINIMUM CONTACTS REQUIREMENT FOR THE EXERCISE OF *IN PERSONAM* JURISDICTION.

In *Rush v. Savchuk*, 444 U.S. 320, 327, 331-332 (1980), this Court held that the Due Process Clause prohibits the exercise of jurisdiction over a non-resident defendant by attributing to that defendant the forum contacts of an associated defendant. In *Rush*, an auto accident case brought against a non-resident driver, Rush, and his insurer, State Farm, this Court first reiterated that the Due Process Clause bars the exercise of jurisdiction over a non-resident defendant unless the defendant has certain minimum contacts with the forum.

> In *Shaffer v. Heitner* we held that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." 433 U.S., at 212, 97 S. Ct., at 2584. That is, a State may exercise jurisdiction over an absent defendant only if the defendant has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "

Rush, 444 U.S. at 327, quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), and *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977).[4] This Court then considered whether jurisdiction could be exercised over a non-resident defendant by attributing to that defendant the forum contacts of an associated defendant (in that case, that defendant's insurer) and held that the Due Process Clause bars it.

> The Minnesota court also attempted to attribute State Farm's contacts to Rush by considering the "defending parties" together and aggregating their forum contacts in determining whether it had jurisdiction. [Footnote omitted.] *The result was the assertion of jurisdiction over Rush based solely on the activities of State Farm. Such a result is plainly unconstitutional.* Naturally, the parties' relationships with each other may be significant in evaluating their ties to the forum. The requirements of *International Shoe*, however, *must be met as to each defendant* over whom a state court exercises jurisdiction.

Rush, 444 U.S. at 331-332 (emphasis added). This Court repeated this holding in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 fn. 13 (1984), citing *Rush* and again stating that "[e]ach defendant's contacts with the forum State must be assessed individually."

In *National Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769, 773 (Tex. S. Ct. 1995), the Texas Supreme Court followed *Rush* and applied this Court's holding in considering – and rejecting – the conspiracy theory of jurisdiction. "As *Rush v. Savchuk*, 444 U.S. 320, 100 S. Ct. 571, 62 L. Ed. 2d 518 (1980) makes clear, it is the contacts of the defendant himself that are determinative. . . . Thus, we decline to recognize the assertion of personal jurisdiction over a non-resident defendant based solely upon the effects or consequences of an alleged conspiracy with a resident in the forum state. Instead, we restrict our inquiry to whether NISA itself purposefully established minimum contacts such as would satisfy due process, and hold that it did not." *National Indus. Sand Ass'n*, 897 S.W.2d at 773. *National Indus. Sand Ass'n* thus confirms that the conspiracy theory of jurisdiction, in which the exercise of jurisdiction over a non-resident is based on attributing to that defendant the forum contacts of an alleged co-conspirator, is not an exception to – but instead is foreclosed by – the holding in *Rush* requiring each defendant's contacts with the forum to be assessed individually and prohibiting the exercise of *in personam* jurisdiction based on attribution of forum contacts of an associated defendant.

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[4] When, as in the present case, the defendant is located outside the United States, due process concerns are heightened and "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Asahi Metal Indus. Co. v. Superior Court Of California, Solano County*, 480 U.S. 102, 115 (1987).

The Illinois Appellate Court's holding in these cases that "[t]he Illinois long-arm statute encompasses the conspiracy theory of jurisdiction" (App. 10a), and the similar holdings of the Seventh Circuit Court of Appeals and the Supreme Courts of Delaware, South Carolina, Iowa, and Minnesota which accept the conspiracy theory of jurisdiction, *Textor v. Board of Regents of Northern Illinois Univ.*, 711 F.2d 1387, 1392 (7th Cir. 1983), *Hercules Inc. v. Leu Trust and Banking (Bahamas) Ltd.*, 611 A.2d 476, 482 (Del. S. Ct. 1992), *Hammond v. Butler, Means, Evins & Brown*, 300 S.C. 458, 463-464, 388 S.E.2d 796, 798-799 (S.C. S. Ct. 1990), *DeCook v. Envt'l Sec. Corp., Inc.*, 258 N.W.2d 721, 728-729 (Iowa S. Ct. 1977), *Hunt v. Nevada State Bank*, 285 Minn. 77, 109-112, 172 N.W.2d 292, 311-312 (1969), are directly contrary to the holding of *National Industrial Sand Ass'n*. The Illinois Appellate Court's decision thus furthers a national split of authority concerning the conspiracy theory of jurisdiction.[5] Left unresolved, this split of authority is likely both to lead other courts astray and to encourage ambitious plaintiffs to shop for a forum where the jurisdictional hurdle is near ground level. Furthermore, as *National Industrial Sand Ass'n* makes evident, the holdings of the Illinois Appellate Court and of the other courts which accept the conspiracy theory of jurisdiction conflict with this Court's holding in *Rush*. Indeed, the failure of the Illinois Appellate Court or the other cases to provide any explanation for their disregard of *Rush*, or to even mention *Rush*, demonstrates their error.[6]

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[5] Other courts which have accepted the conspiracy theory of jurisdiction include Pennsylvania federal district and state appellate courts, *Santana Prods., Inc. v. Bobrick Washroom Equip.*, 1998 WL 420635 at *7 (M.D. Pa. July 24, 1998), quoting *Temtex Prods., Inc. v. Kramer*, 330 Pa. Super. 183, 479 A.2d 500 (1984); New York federal district and state appellate courts, *Small v. Lorillard Tobacco Co., Inc.*, 677 N.Y.S.2d 515, 526 (1998), *Levisohn, Lerner, Berger & Langsam v. Medical Taping Sys., Inc.*, 10 F. Supp. 2d 334, 341-342 (1998); the Florida appellate court, *Execu-Tech Business Sys., Inc. v. New Oji Paper Co. Ltd.*, 708 So. 2d 599,

Moreover, by permitting the exercise of jurisdiction over a non-resident defendant having no forum contacts based solely on attribution of the forum contacts of an alleged co-conspirator, the Illinois Appellate Court's decision and the other cases eviscerate the Due Process Clause's requirement, which has been the law of the land since *International Shoe*, that a non-resident defendant cannot be subject to jurisdiction unless that defendant has minimum contacts with the forum. These decisions permit the minimum contacts requirement to

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600 (1998) (*review granted* August 20, 1998); and the Georgia appellate court, *Rudo v. Stubbs*, 221 Ga. App. 702, 703-704, 472 S.E.2d 515, 517 (1996). Other courts which have rejected this jurisdictional theory include the California appellate court, *Mansour v. Superior Court*, 38 Cal. App. 4th 1750, 1760, 46 Cal. Rptr. 2d 191, 197 (1995); the Washington appellate court, *Hewitt v. Hewitt*, 78 Wash. App. 447, 455, 896 P.2d 1312, 1316 (1995); and a Vermont federal district court, *Turner v. Baxley*, 354 F. Supp. 963, 977 (D. Vt. 1972).

[6] It should also be noted that although *Hercules Inc.* does not mention *Rush*, it follows *Istituto Bancario Italiano SpA v. Hunter Eng'g Co., Inc.*, 449 A.2d 210 (Del. S. Ct. 1982), which does cite *Rush*. In *Hunter Eng'g Co., Inc.*, however, the Delaware Supreme Court does not discuss the holding of *Rush* at issue here – the prohibition on exercising jurisdiction based on attribution of forum contacts (*see* 449 A.2d at 219-221) – and does not mention *Rush* in its consideration of the conspiracy theory of jurisdiction. *See* 449 A.2d 222-228. Indeed, in *Hunter Eng'g Co., Inc.*, the Delaware Supreme Court stated that "[t]o our knowledge, the United States Supreme Court, as yet has not definitively examined the conspiracy theory of jurisdiction." 449 A.2d at 225.

be avoided simply by claiming that a non-resident participated in a conspiracy with a co-conspirator having forum contacts. The Illinois Appellate Court's decision thus further threatens to work a fundamental change in the law of the land and accordingly warrants review and reversal.

II. THE ILLINOIS APPELLATE COURT'S DECISION PERMITTING THE EXERCISE OF *IN PERSONAM* JURISDICTION BASED ON A BARE ALLEGATION OF CONSPIRACY CREATES A SPLIT OF AUTHORITY WITH FIVE CIRCUIT COURTS OF APPEAL AND RENDERS THE DUE PROCESS CLAUSE'S MINIMUM CONTACTS REQUIREMENT ESSENTIALLY MEANINGLESS BY PERMITTING IT TO BE SATISFIED BY A BOILERPLATE ALLEGATION.

The United States Courts of Appeal for the First, Sixth, Seventh, Tenth, and D.C. Circuits have each held that the Due Process Clause bars the exercise of *in personam* jurisdiction based on a bare allegation that a non-resident defendant "conspired" with other defendants having forum contacts. "The cases are unanimous that a bare allegation of a conspiracy between the defendant and a person within the personal jurisdiction of the court is not enough" to permit the exercise of jurisdiction over the non-resident defendant. *Ahmed v. Quinn*, 124 F.3d 203, 1997 WL 471335 at *3 (7th Cir. Aug. 13, 1997), quoting *Stauffacher v. Bennett*, 969 F.2d 455, 460 (7th Cir. 1992); *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1031 (D.C. Cir. 1997) (" 'bald speculation' or a 'conclusionary [sic] statement' that individuals are co-conspirators is insufficient to establish personal jurisdiction under a conspiracy theory"); *Chandler v. Barclays Bank PLC*, 898 F.2d 1148, 1155 (6th Cir. 1990) ("[T]otally unsupported allegations of conspiracy cannot constitute sufficient contacts . . . to justify an exercise of personal jurisdiction"); *American Land Program, Inc. v. Bonaventura Uitgevers Maatschappij, N.V.*, 710 F.2d 1449, 1454 (10th Cir. 1983) ("Mere allegations of conspiracy, without some sort of prima facie factual showing of a conspiracy, cannot be the basis of personal jurisdiction of [sic] co-conspirators outside the territorial limits of the court"); *Glaros v. Perse*, 628 F.2d 679, 682 (1st Cir. 1980) ("allegations of conspiracy [that] were purely conclusory" are "insufficient to warrant the exercise of personal jurisdiction over the out-of-state governmental defendants"). To the extent that the conspiracy theory of jurisdiction is constitutionally viable, the Due Process Clause requires this prohibition. "Otherwise plaintiffs could drag defendants to remote forums for protracted proceedings even though there were grave reasons for questioning whether the defendant was actually suable in those forums." *Stauffacher*, 969 F.2d at 460.

In direct conflict with these cases, the Illinois Appellate Court held that a complaint that alleges "*no facts as to how the conspiracy came about, other than that the named conspirators 'conspired,'* " provides sufficient basis under the Due Process Clause to permit the exercise of jurisdiction over the foreign defendant based solely on attributed contacts. (App. 11a ("Although the complaints alleged no facts as to how the conspiracy came about, other than that the named conspirators 'conspired,' the allegation is sufficient to overcome a challenge to personal jurisdiction").) This decision thus creates a split of authority with five Circuit Courts of Appeal. Moreover, the Illinois Appellate Court's decision renders the Due Process Clause's minimum contacts requirement essentially meaningless by permitting the requirement to be avoided by the mere inclusion of a bare allegation that the non-resident defendant "conspired" with other defendants having forum contacts. If the Illinois Appellate Court's decision is permitted to stand – and to be followed in other jurisdictions – plaintiffs will not have to concern themselves with concepts of minimum contacts and due process. Instead, they will be permitted to satisfy all jurisdictional requirements simply by alleging that the non-resident defendant "conspired." The conspiracy theory of jurisdiction – especially when stripped of all requirements that the conspiracy be pleaded with particularity as to each defendant – is too tempting an invitation for plaintiffs seeking to acquire jurisdiction over foreign defendants. It is also far too serious a threat to the protection that the Due Process Clause has historically afforded to parties as the ultimate defense against a court's abuse of its fundamental power. The endorsement of this legal theory by the Illinois Appellate Court accordingly warrants review and reversal.

◆

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

STEPHEN J. MARZEN
SHEARMAN & STERLING
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 508-8000

WERNER L. POLAK
STEPHEN FISHBEIN
SHEARMAN & STERLING
599 Lexington Avenue
New York, New York 10022
(212) 848-4000

JOHN E. FREY
DAVID M. SIMON
WILDMAN, HARROLD, ALLEN
& DIXON
225 Wacker Drive
Chicago, Illinois 60606
(312) 201-2000

NOS. 4-97-0385, 4-97-0386 cons.

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

MARGE CAMERON, Individually) Appeal from
and as Special Administrator of the) Circuit Court of
Estate of J. Bernard Latta, Deceased,) McLean County
Plaintiff-Appellee,) No. 95L112
)
V. (No. 4-97-0385)) No. 95L50
OWENS-CORNING FIBERGLAS) Honorable
CORPORATION,) Ronald C. Dozier,
et al.,) Judge Presiding.
Defendants,)
) (Filed
and) May 29, 1998)
CHARTER PLC,)
Defendant-Appellant.)
)

ELEANOR PRICE, Individually and)
As Special Administrator of the)
Estate of Floyd Price, Deceased,)
)
Plaintiff-Appellee,)
V. (No. 4-97-0386))
)
UNARCO INDUSTRIES, INC., et al.,)
Defendants,)
)
and)
CHARTER PLC,)
Defendant-Appellant.)
)

JUSTICE McCULLOUGH delivered the opinion of the court:

In these consolidated appeals, this court allowed the petition of defendant Charter PLC (Charter) for leave to appeal the denial of its motions to dismiss for lack of personal jurisdiction. 166 Ill. 2d R. 306(a)(3). In No. 4-97-0385, the plaintiff is Marge Cameron, individually and as special administrator of the estate of J. Bernard Latta, deceased. In No. 4-97-0386, the plaintiff is Eleanor Price, individually and as special administrator of the estate of Floyd J. Price, deceased. Other named defendants are not involved in this appeal. The issues are whether (1) the trial court erred in ruling that *in personam* jurisdiction over Charter can be based on activities of alleged coconspirators; and (2) Charter did not have sufficient contacts with Illinois on which to base *in personam* jurisdiction. We affirm.

On March 24, 1995, Cameron filed her complaint against multiple defendants in this asbestos case. Her complaint alleged a conspiracy among the defendants and others. Count I was a wrongful death action, and count II sought damages for Latta's injuries prior to death. Summons and complaint were served on Charter on April 5, 1995, in Jefferson County, Illinois.

On May 8, 1995, Charter filed a special and limited appearance and a motion to quash service of process. That motion, and supporting affidavits, indicated (1) Charter was a corporation organized under the laws of the United Kingdom; (2) plaintiff served "Charter Consolidated PLC, National Mine Service, Route 37 N. Mt Vernon, Illinois," at a warehouse facility of National Mine Service, Inc.; (3) prior to March 8, 1995, defendant indirectly owned shares of National Mine Service, but National Mine Service sold all its assets to a subsidiary of Marmon Corporation, including the warehouse in Mt. Vernon; (4) these assets were later transferred to National Mine Service, Inc., another Marmon subsidiary; (5) Charter had no affiliation with or interest in Marmon or National Mine Service, Inc.; (6) Charter indirectly continues to own shares of National Mine Service Company, which had changed its name to Distribution and Mining Equipment

Company and is dormant and conducts no business in Illinois or anyplace else; and (7) Marmon, National Mine Service, Inc., and their employees are not registered agents of Charter. The trial court allowed plaintiff to depose Charter's affiants without affecting Charter's special and limited appearance.

On August 8, 1995, plaintiff Cameron served an alias summons and complaint on Distribution Mining and Equipment Company through CT Corporation System, Chicago, Illinois. Charter moved to quash the alias summons on the ground that Charter and Distribution mining are separate companies; CT Corporation System is not a registered agent of Charter; and no officer, director, or employee of Distribution Mining and Equipment Company is an officer, director, or employee of Charter. The motion was supported by affidavits. The parties filed numerous documents and depositions. On October 18, 1996, the motion to quash was denied, and Charter's special and limited appearance was overruled after the trial court found that service was proper based on the relationship of Fred 0. Clayton to both Charter and Distribution Mining and Equipment Company.

On November 14, 1996, Charter again filed a special and limited appearance and a motion to dismiss for lack of personal jurisdiction. Plaintiff Cameron moved to strike Charter's motion on the ground that it had waived the right to challenge personal jurisdiction because of the prior motions and rulings on the motion to quash service. Plaintiff's motion was denied. On April 28, 1997, the trial court denied Charter's motion to dismiss the complaint for lack of jurisdiction. This appeal, No. 4-97-0385, followed.

On February 23, 1995, Price filed a complaint alleging multiple counts. Charter was named a defendant in counts X, XI, and XII. Count X was a conspiracy in a wrongful death action, count XI sought damages for injuries to Floyd Price prior to his death, and count XII was for loss of consortium. The procedural history of this case is essentially the same as in Cameron.

The allegations of the counts of the complaints in both cases naming Charter as a defendant are also substantially the same. The complaints name Johns-Manville Corporation;

Johns-Manville Sales Company; UNARCO Industries, Inc.; and Raymark Industries, Inc.; or their corporate predecessors, as coconspirators of Charter and the other named defendants. The complaints alleged the conspirators (1) were active in the asbestos business for many years, had knowledge of manufacturing operations using asbestos, and had actual knowledge of asbestos disease and death among workers exposed to asbestos as early as the 1930s; (2) knew workers were ignorant of the hazardous propensities of asbestos; (3) knew asbestos was inherently dangerous; (4) had employees who were exposed to asbestos dust and had a duty to provide a safe workplace or to warn of the hazards; (5) knew that, if they adequately warned their employees and others whose work brought them into contact with the asbestos, the publication would cause workers to leave asbestos-using industries, reducing sales and uses of asbestos; and (6) knowingly conspired and agreed among themselves to

> "a) positively assert in a manner not warranted by the information possessed by the conspirators, that which was and is not true, to wit, that it was safe for people to work with and in closed [*sic*] proximity to asbestos and asbestos[-]containing materials; [and]
>
> b) suppress information about the harmful effects of asbestos, including medical and scientific data, causing workers to be and to remain ignorant of that information."

The complaints alleged, *e.g.*, that, in furtherance of the conspiracy, the conspirators did one or more of the following acts:

> "a) sold asbestos which was used at the plant without warning of the hazards known to the seller;
>
> b) refused to warn its own employees about the hazards of asbestos known to it, including the refusal of Unarco to warn its employee, J. Bernard Latta, about the hazards of asbestos known to Unarco;

c) edited and altered the reports and drafts of publications initially prepared by Dr. Lanza concerning the hazards of asbestos during the 1930's;

d) agreed in writing not to disclose the results of research on the effects of asbestos upon health unless the results suited their interests;

e) obtained an agreement in the 1930's from the editors of *ASBESTOS*, the only trade magazine devoted exclusively to asbestos that the magazine would never publish articles on the fact that exposure to asbestos caused disease, and sustained this agreement into the 1970's;

f) suppressed the dissemination of a report by Dr. Gardner in 1943 which was very critical of the concept that there was a safe level of asbestos exposure;

g) through their control of the Asbestos Textile Institute (ATI), defeated further study of the health of workers when William Hemeon graphically demonstrated the need for such study and dissemination of information in the 1940's; [and]

h) edited and altered the reports and drafts of publications regarding asbestos and health initially prepared by Dr. Vorwald during 1948-1951."

Plaintiffs argue that the challenge to the personal jurisdiction has been "waived" since it was not raised at the time of the first special and limited appearance. Section 2-301 of the Code of Civil Procedure (Code) states, in relevant part:

> "(a) Prior to filing any other pleading or motion, a special appearance may be made either in person or by attorney for the purpose of objecting to the jurisdiction of the court over the person of the defendant. A special appearance may be made as to an entire proceeding or as to any cause of action

> involved therein. Every appearance, prior to judgment, not in compliance with the foregoing is a general appearance.
>
> (b) If the reasons for objection are not apparent from the papers on file in the case, the special appearance shall be supported by affidavit setting forth the reasons. In ruling upon the objection, the court shall consider all matters apparent from the papers on file in the case, affidavits submitted by any party, and any evidence adduced upon disputed issues of fact. No determination of any issue of fact in connection with the objection is a determination of the merits of the case or any aspect thereof. A decision adverse to the objector does not preclude the objector from making any motion or defense which he or she might otherwise have made." 735 ILCS 5/2-301(a), (b) (West 1994).

Plaintiffs argue that "a special appearance" means only one may be filed. However, the article "all is generally not used in the singular sense unless that intention is clear from the statutory language. *Lindley v. Murphy,* 387 Ill. 506, 517, 56 N.E.2d 832, 838 (1944).

Even though that would promote judicial economy, none of the cases cited by plaintiffs stand for that proposition. *R.W. Sawant & Co. v. Allied Programs Corp.*, 130 Ill. App. 3d 71, 74, 473 N.E.2d 496, 498-99 (1984), held it was proper to file a special and limited appearance on a motion to quash service of summons after the entry of a default judgment. *Hawes v. Hawes,* 130 Ill. App. 2d 546, 547-49, 263 N.E.2d 625, 626-27 (1970), involved vacating a portion of a divorce decree following the entry of a special and limited appearance to challenge the trial court's jurisdiction. *Albers v. Martin,* 316 Ill. App. 446, 45 N.E.2d 102, 102-03 (1942) (abstract of op.), is a *scire facias* proceeding to revive a judgment, and has been published in abstract form only; such opinions are not to be cited in the briefs of litigants unless the entire text of the abstract opinion is appended to the brief (47 Ill. App. 3d R. 8), which it was not in this instance.

Section 2-301 of the Code provides that a special appearance can be made before filing any other pleading or motion, *i.e.*, before a general appearance has been made. A general appearance by a defendant waives any objection to jurisdiction over that person. *Duncan v. Charles*, 5 Ill. (4 Scam.) 561, 569, (1842). Since the special appearance challenges jurisdiction over the party, it cannot be turned into a general appearance simply because a successive special appearance, based on a different ground, is also filed attacking jurisdiction over the same person. Section 2-301 of the Code does not prohibit successive special appearances as long as a general appearance has not yet been made.

The issue of whether the trial court has personal jurisdiction over Charter is a question of law, which this court considers *de novo*. *White v. Ratcliffe*, 285 Ill. App. 3d 758, 764, 674 N.E.2d 906, 911 (1996). In ruling on an objection to personal jurisdiction, "the court shall consider all matters apparent from the papers on file in the case, affidavits submitted by any party, and any evidence adduced upon disputed issues of fact." 735 ILCS 5/2-301(b) (West 1996). Since no evidence on disputed facts was adduced in this case, the standard of review is the same as for a section 2-619 motion to dismiss, which may be supported by affidavits and opposed by counteraffidavits. See 735 ILCS 5/2-619 (West 1996); *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116, 619 N.E.2d 732, 735 (1993).

The Illinois long-arm statute, section 2-209 of the Code, provides in relevant part:

> "(a) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, his or her personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of such acts:
>
> * * *
>
> (2) The commission of a tortious act within this State;

* * *

> (c) A court may also exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States." 735 ILCS 5/2-209(a)(2), (c) (West 1994).

In *Ores v. Kennedy,* 218 Ill. App. 3d 866, 872, 578 N.E.2d 1139, 1144 (1991), the court stated:

> "Pursuant to the amended Illinois longarm statute and before exercising *in personam* jurisdiction, due process requires that a non-resident defendant have certain minimum contacts with the forum State such that maintenance of the suit there does not offend 'traditional notions of fair play and substantial justice. (*International Shoe Co. v. Washington* (1945), 326 U.S. 310, 316, 90 L. Ed. 95, 102, 66 S. Ct. 154, 158.) Therefore, the following three criteria must be considered to determine whether the court's exercise of jurisdiction over Golden satisfies due process: (1) whether the nonresident defendant had 'minimum contacts' with the forum State such that he had 'fair warning' that he may be required to defend himself there; (2) whether the action arose out of or relates to the defendant's contacts with the forum; and (3) whether it is reasonable to require the defendant to litigate in the forum State. *Burger King Corp. v. Rudzewicz* (1985), 471 U.S. 462, 471-78, 85 L. Ed. 2d 528, 540-44, 105 S. Ct. 2174, 2181-85."

Federal standards are the outer limits beyond which the state may not go to acquire jurisdiction over nonresidents, and Illinois courts must look to both the federal standards and the long-arm statute. *Rollins v. Ellwood,* 141 Ill. 2d 244, 271, 565 N.E.2d 1302, 1314 (1990). Furthermore, the Illinois Constitution contains its own guarantees of due process (Ill. Const. 1970, art. 1, §2), separate and independent from the federal guarantees. *Rollins,* 141 Ill. 2d at 275, 565 N.E.2d at 1316.

> "Jurisdiction is to be asserted only when it is fair, just, and reasonable to require a nonresident defendant to defend an action in Illinois, considering the quality and nature of the defendant's acts which occur in Illinois or which affect interests located in Illinois. See *People ex rel. Mangold v. Flieger* (1985), 106 Ill. 2d 546, 550." *Rollins,* 141 Ill. 2d at 275, 565 N.E.2d at 1316.

Charter argues that a conspiracy theory, as a basis for personal jurisdiction, has been held to be invalid. Charter relies on *Green v. Advance Ross Electronics Corp.,* 86 Ill. 2d 431, 440-41, 427 N.E.2d 1203, 1208 (1981). *Green,* however, stated it did not work in that case because Illinois had jurisdiction over one alleged conspirator only because that individual elected to come to Illinois to sue the defendants. That fact did not indicate that any of the tortious acts he was charged with performing in common with his father satisfied the long-arm statute. The Illinois Supreme Court went on to state that, for all coconspirators to be subject to Illinois jurisdiction, one coconspirator must have committed a tortious act within Illinois as agent for the other co-conspirators. *Green* did note that the conspiracy theory of jurisdiction had been questioned in *Chromium Industries, Inc. v. Mirror Polishing & Plating Co.,* 448 F. Supp. 544, 552 (N.D. Ill. 1978). *Ores* stated that the legislative amendment of section 2-209 of the Code to add what is now subsection (c) effectively overruled the language in *Green* (later restated in *Rollins)* to the effect that a statute worded such as that in Illinois should have a fixed meaning. *Ores,* 218 Ill. App. 3d at 872, 578 N.E.2d at 1144. The underlying incident and the filing of the original complaint in *Rollins* occurred in 1986. The relevant amendment to section 2-209 was effective November 23, 1987. 735 ILCS Ann. 5/2-209, Historical and Statutory Notes (Smith-Hurd 1992). Plaintiffs suggest that the "any other basis" language in section 2-209(c) of the Code is a basis for obtaining jurisdiction over Charter by using it as a vehicle for incorporating the conspiracy theory of jurisdiction into Illinois law.

In *Textor v. Board of Regents of Northern Illinois, University,* 711 F.2d 1387, 1392-93 (7th Cir. 1983), the court considered the Illinois long-arm statute. The complaint alleged the defendants (universities affiliated with the Mid-America Conference) conspired to discriminate against women's athletics in violation of the federal constitution and statutes and in so doing, engaged in conferences, meetings, and discussions in De Kalb, Illinois, at which directives and requests were issued regarding women's athletics. In *Textor,* the seventh circuit applied the conspiracy theory of personal jurisdiction as a "time-honored notion."

Charter points out that the conspiracy jurisdiction theory has been criticized for merging otherwise distinct questions of jurisdiction and substantive liability. In *Adcock v. Brakegate, Ltd.,* 164 Ill. 2d 54, 62-63, 645 N.E.2d 888, 894, (1994), the Illinois Supreme Court discussed the extension of liability in tort beyond the active wrongdoer to those who have merely planned, assisted or encouraged the wrongdoer's acts by way of a theory of civil conspiracy, and set out the elements for establishing a civil conspiracy. The Illinois long-arm statute encompasses the conspiracy theory of jurisdiction.

Charter further argues that the complaints in these cases fail to allege the existence of conspiracy with particularity and they especially do not allege agency. For this analysis, it is important to note that the agreement, although a necessary element in civil conspiracy, is not itself a tort. There must be some tortious act or acts performed in furtherance of the agreement. *Adcock,* 164 Ill. 2d at 62-63, 645 N.E.2d at 894. Although defendant may contest whether it is responsible for an act or omission causing an injury in Illinois or whether its contacts with the State were sufficient to satisfy due process, it may not contest whether the conduct was in fact tortious. 3 R. Michael, Illinois Practice §6.5, at 68 (1989) (Civil Procedure Before Trial). Whether plaintiff sufficiently alleged a cause of action is properly addressed in a motion to dismiss pursuant to section 2-615 of the Code. 735 ILCS 5/2-615 (West 1996).

In the context of a motion to dismiss for failure to state a cause of action, bare allegations of conspiracy are insufficient to plead conspiracy as a matter of substantive liability. *Hume & Liechty Veterinary Associates v. Hodes,* 259 Ill. App. 3d 367, 369, 632 N.E.2d 46, 48 (1994). Charter argues that is also true for a conspiracy theory of personal jurisdiction. Although the complaints alleged no facts as to how the conspiracy came about, other than that the named conspirators "conspired," the allegation is sufficient to overcome a challenge to personal jurisdiction.

Charter relies on the unrebutted affidavit of Peter Thwaite, Charter's secretary, filed in support of Charter's motion to dismiss for lack of personal jurisdiction. That affidavit stated that (1) Charter has never mined, processed, sold, or distributed asbestos or asbestos-containing products or engaged in any aspect of the asbestos business; (2) it has not conspired with any party to distribute asbestos or asbestos-containing products; (3) Charter conducts no business in Illinois; has no certificate of authority to transact business in Illinois; has never entered into a contract to be performed in Illinois; has never maintained an office in Illinois; has never owned real estate in Illinois; has no director, officer or employee who ever resided in Illinois; never maintained a post office box or telephone in Illinois; has no registered agent for service of process in Illinois; has never had a bank account in Illinois; has never advertised in Illinois; and has never paid taxes or franchise fees or commenced law suits in Illinois; (4) "Charter plc" is an investment holding company which, in 1993, acquired all outstanding shares of Charter Consolidated P.L.C., which was incorporated in the United Kingdom in 1964; (5) Cape PLC, formerly Cape Industries PLC, is a holding company incorporated in 1983, and it holds shares in companies engaged in, among other things, industrial construction and manufacturing of building products; (6) until June 1979, Cape indirectly owned companies that were engaged in mining and marketing asbestos; (7) in June 1979 those assets were sold to a company unaffiliated with Cape or Charter; (8) in 1965, Charter acquired the Central mining and Investment Corporation Limited, which indirectly owned 16.86% of Cape through a subsidiary; (9) Charter, through subsidiaries, acquired an increasingly larger share of Cape over the years until it owned as much as 67.3%; (10) Charter sold all shares of Cape as of July 18, 1996; (11) Charter did nominate directors (never more than three) to Cape's board (7 to 13 members between 1969 through 1996) and no Charter nominee or employee was an officer of Cape or responsible for management; (12) in 1969, the managing director and chairman of Cape joined Charter's board, and he left in 1979; (13) no member of Cape's management has been on Charter's board; (14) the boards of Cape and Charter had always acted separately, with board meetings held at different places and times; (15) Cape and Charter always engaged in entirely different businesses with completely separate operations and Charter never participated in any management or operation decisions of Cape; (16) Charter never owned any share in Cape subsidiaries, was not involved in their operation, never had officers in common with one exception, held separate shareholder meetings, and maintained separate offices; had separate bank accounts, books, and records; and no employees of Charter were transferred to Cape or Cape's subsidiaries, and no employees of these companies were transferred to Charter; (17) Charter never provided financing to any Cape subsidiary, including those engaged in the mining and marketing of asbestos; (18) Charter has never been consulted by Cape or its subsidiaries concerning the mining, marketing, prospecting, or sale of asbestos, or the making of long-term policy on such matters; and (19) Charter has never been consulted by any Cape subsidiary about advertising, promotion, customers, development, supply, distribution, capital expenditures, prices, or personnel. The concluding paragraph of the affidavit states:

> "24. As set forth above, Charter has never engaged in any aspect of the asbestos business, nor has Charter participated in the asbestos business that at one time was carried on by subsidiaries of Cape. Accordingly, plaintiff's allegation that Charter somehow was part of a conspiracy to distribute asbestos and to suppress medical research regarding asbestos is incorrect and without any basis in fact. Charter never conspired with Cape or anyone else,

> nor has Cape or any of the other defendants named in the complaint ever acted as an agent of Charter."

Well-alleged facts in an affidavit regarding jurisdiction, which are not contradicted by counteraffidavit, are taken as true notwithstanding the existence of contrary averments in the adverse party's pleadings. *Kutner v. DeMassa,* 96 Ill. App. 3d 243, 248, 421 N.E.2d 231, 235 (1981). In *Kutner*, the counteraffidavits were determined to be insufficient. Here, plaintiffs filed no counteraffidavits alleging evidentiary facts upon which the conclusions of agency or conspiracy are based. Thwaite's statements that the allegations of the complaint "are untrue and without foundation," and that plaintiff's arguments "would be an incorrect interpretation of the relationship among Charter, Cape, and Cape's former subsidiaries," are mere conclusions, not well-alleged facts. Thwaite's affidavit concedes that until 1979 Cape Industries PLC indirectly owned companies that were engaged in the mining and marketing of asbestos, that after 1969 Charter owned a majority interest in Cape, that Charter placed three directors on Cape's Board, that Cape's managing director and chairman was a member of Charter's board, and that Charter and Cape filed consolidated tax returns. Thwaite's affidavit does not refute, except in conclusory fashion, the allegations of the complaint that for many years those in the asbestos industry knew of the dangers of asbestos, yet positively asserted that asbestos was safe and suppressed information about the harmful effects of asbestos.

In *Mohn v. International Vermiculite Co.*, 147 Ill. App. 3d 717, 718-23, 498 N.E.2d 375, 375-79 (1986), the plaintiff's action against Charter was dismissed for lack of personal jurisdiction. The nature of Charter's relationship to Cape was also discussed in that case. The trial court found Charter was not Cape's alter ego, declined to pierce the corporate veil, and refused to apply collateral estoppel against Charter utilizing a Pennsylvania case. This court affirmed the order of the trial court. However, this court's consideration in *Mohn* was limited to the issue of the collateral-estoppel effect of a foreign judgment, an issue not raised in this case.

Plaintiffs do not have to prove their entire case to get by a challenge to personal jurisdiction over a defendant. Plaintiffs have alleged a conspiracy with sufficient specificity to provide the circuit court with jurisdiction over Charter.

Accordingly, the order of the circuit court denying defendant's motion to dismiss for lack of personal jurisdiction over Charter is affirmed.

Affirmed.

GREEN, J., concurs.

COOK, J., specially concurs.

JUSTICE COOK, specially concurring:

There are significant differences between a trial court's resolution of a motion for summary judgment and its resolution of an objection to jurisdiction. The purpose of a motion for summary judgment is to determine the existence of triable issues of fact, not to resolve those issues. *Winnetka Bank v. Mandas*, 202 Ill. App. 3d 373, 387, 559 N.E.2d 961, 969 (1990). In contrast, an objection to jurisdiction must actually be decided on the merits. *Finnegan v. Les Pourvoiries Fortier, Inc.*, 205 Ill. App. 3d 17, 25, 562 N.E.2d 989, 993-94 (1990); *cf. Kutner v. DeMassa*, 96 Ill. App. 3d 243, 247, 421 N.E.2d 231, 234-35 (1981) A trial court considering an objection to jurisdiction may take evidence on relevant disputed issues of fact. 735 ILCS 5/2-301(b) (West 1996). A reviewing court may not disturb the trial court's findings on an objection to jurisdiction unless they are against the manifest weight of the evidence. *Finnegan*, 205 Ill. App. 3d at 25, 562 N.E.2d at 994.

It is sometimes said that the hearing on the defendant's special appearance is the sole opportunity to defeat the jurisdiction of the court. 3 R. Michael, Illinois Practice §6.2, at 61 (1989) (Civil Procedure Before Trial). When a defendant loses a jurisdictional argument on a special appearance, concern has been expressed that the defendant will not have any right to appeal unless the appellate court grants leave to appeal under Rule 306(a)(3) (166 Ill. 2d R. 306(2)(3)), because taking part in further proceedings will waive the objection. Error in ruling on the objection is not waived by taking part in further proceedings, however, where the objection is that the defendant is not "amenable" to process. 735 ILCS 5/2-301(c) (West 1996). If the objection is that defendant has not been properly served, that objection is waived by taking part in the proceedings. If the objection is that defendant could never be properly served, that objection is not waived by taking part in the proceedings. Where the objection is not waived it may be raised in an appeal at the conclusion of the trial, and it would appear that evidence presented during the trial relating to jurisdiction could also be considered at that time.

The court need not determine, where jurisdiction is asserted on the basis of a tortious act, whether the act or omission is in fact tortious. If the defendant or its agent performs an act or omission that causes an in jury in Illinois and the plaintiff *alleges* that the act or omission was tortious in nature, the jurisdictional requirement is satisfied. *Nelson v. Miller,* 11 Ill. 2d 378, 393-94, 143 N.E.2d 673, 681 (1957); see 3 R. Michael, Illinois Practice §6.5, at 68 (1989) (Civil Procedure Before Trial).

The addition of the concept of conspiracy to the concept of long-arm jurisdiction may broaden that jurisdiction. It is no longer necessary that the defendant or its agent perform an act or omission that causes an injury in Illinois; it is only necessary that a conspirator perform an unlawful act pursuant to and in furtherance of the conspiracy that causes an injury in Illinois. *Adcock v. Brakegate, Ltd.,* 164 Ill. 2d 54, 65, 645 N.E.2d 888, 895 (1994). Even though long-arm jurisdiction may be broadened, the tort of conspiracy has been recognized in Illinois. *Adcock,* 164 Ill. 2d at 62-63, 645 N.E.2d at 894. There seems to be no good reason to ignore conspiracies in deciding long-arm jurisdiction. The Illinois long-arm statute extends as far as the Constitution permits, and other courts have found jurisdiction based on allegations of conspiracy to be appropriate. See *Textor,* 711 F.2d at 1392-93; *In re North Dakota Personal Injury Asbestos Litigation No. 1,* 737 F. Supp. 1087, 1095 (D.N.D. 1990). A finding of jurisdiction in this case is a logical extension of the analysis begun in *Gray v. American Radiator & Standard Sanitary Corp.,* 22 Ill. 2d

432, 176 N.E.2d 761 (1961), that the distribution of a product with the expectation that the product may be used in Illinois gives jurisdiction to Illinois when an injury occurs in Illinois. If Charter had the expectation that the products of its alleged co-conspirators might be used in Illinois, then there is jurisdiction in Illinois when an injury is caused by those products, even if Charter did not benefit from those products, or even know of their specific distribution. See *Halberstam v. Welch,* 705 F.2d 472, 481 (D.C. Cir. 1983), quoted in *Adcock,* 164 Ill. 2d at 65, 645 N.E.2d at 895.

The question before this court is not whether Charter is Cape's agent for service of process, or whether Charter is Cape's alter ego. It is possible that Charter will be held liable in this case, as a conspirator, for the actions of corporations, completely separate from Cape, that sold asbestos in Illinois.

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

85740

October 6, 1998

Mr. David M. Simon
Wildman, Harrold, Allen & Dixon
225 West Wacker Drive
Suite 3000
Chicago, IL 60606-1229

No. 85740 – Marge Cameron, Indv., etc., et al., respondents, v. Owens-Corning Fiberglas Corporation et al. (Charter PLC, petitioner). Leave to appeal, Appellate Court, Fourth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 28, 1998.

THE ELEVENTH JUDICIAL CIRCUIT
McLEAN COUNTY, ILLINOIS

Price	)	
Plaintiff	)	NO.
Charter	)	95 L 50
Defendant	)	
	)	

ORDER

Cause heard on Charter's Motion to Dismiss for lack of Personal jurisdiction and certain motions of Plaintiff related thereto; Plaintiff and Charter present by counsel, the court being fully advised.

IT IS ORDERED that Plaintiff's Motion to Strike the affidavit of Peter Thwaite and Plaintiff's two motions to strike filed April 29, 1997, are all denied;

IT IS FURTHER ORDERED that Charter's Motion to Dismiss for Lack of Personal Jurisdiction is denied and Charter is ordered to answer or otherwise plead W/I 35 days.

/s/ Ronald Dozier
Judge

DATE April 28, 1997

Name	Walker
Attorney for	Plaintiff
Address	
City	
Telephone	

THE ELEVENTH JUDICIAL CIRCUIT
McLEAN COUNTY, ILLINOIS

Cameron	)	
Plaintiff	)	NO.
Charter	)	95 L 112
Defendant	)	
	)	

ORDER

Cause heard on Charter's Motion to Dismiss for lack of Personal jurisdiction and certain motions of Plaintiff; Plaintiff and Charter present by counsel, the court being fully advised;

IT IS ORDERED that Plaintiff's Motion to Strike the affidavit of Peter Thwaite and Plaintiff's two motions to strike filed April 28, 1997, are all denied;

IT IS FURTHER ORDERED that Charter's Motion to Dismiss for Lack of Personal Jurisdiction is denied and Charter is ordered to answer or otherwise plead W/I 35 days.

/s/ Ronald Dozier
Judge

DATE April 28, 1997

Name Walker
Attorney for Plaintiff
Address
City
Telephone

No. **85740**

IN THE
Supreme Court of Illinois

MARGE CAMERON, Individually and as Special Administrator of the Estate of J. Bernard Latta, deceased, *Plaintiff-Respondent,* *v.* **OWENS-CORNING FIBERGLAS CORPORATION, et al.,** *Defendants,* *and* **CHARTER PLC,** *Defendant-Petitioner.*	Petition for Leave to Appeal from the Appellate Court of Illinois, Fourth District No. 4-97-0385 Appeal from the Eleventh Judicial Circuit Court, County of McLean No. 95 L 50 The Honorable **Ronald C. Dozier,** Judge Presiding.

PETITION FOR LEAVE TO APPEAL OF DEFENDANT-PETITIONER CHARTER PLC

(Filed Jun. 26, 1998)

WILDMAN, HARROLD, ALLEN & DIXON
JOHN E. FREY
DAVID M. SIMON
225 WEST WACKER DRIVE
SUITE 3000
CHICAGO, ILLINOIS 60606-1229
(312) 201-2000

SHEARMAN & STERLING
WERNER L. POLAK
STEPHEN FISHBEIN
599 LEXINGTON AVENUE
NEW YORK, NEW YORK, 10022
(212) 848-4000

Attorneys for Defendant-Petitioner,
Charter plc

ORAL ARGUMENT REQUESTED

No.

IN THE SUPREME COURT OF ILLINOIS

MARGE CAMERON, Individually and as Special Administrator of the Estate of J. BERNARD LATTA, deceased,	Petition for Leave to Appeal from the Appellate Court of Illinois, Fourth District
Plaintiff-Respondent,	No. 4-97-0385
v.	Appeal from the Eleventh Judicial Circuit Court, County of McLean
OWENS-CORNING FIBERGLAS CORPORATION, et al.,	No. 95 L 112
Defendants,	The Honorable Ronald C. Dozier, Judge Presiding.
and	
CHARTER PLC,	
Defendant-Petitioner.	

PETITION FOR LEAVE TO APPEAL OF DEFENDANT-PETITIONER CHARTER PLC

PRAYER FOR LEAVE TO APPEAL

Defendant-petitioner Charter plc ("Charter") respectfully petitions this Court for leave to appeal from the decision of the Appellate Court of Illinois, Fourth District, affirming the McLean County Circuit Court's order denying Charter's motion to dismiss for lack of personal jurisdiction.

THE APPELLATE COURT'S JUDGMENT

The appellate court's judgment was entered on May 29, 1998. An affidavit of intent to seek review was filed with the appellate court on June 16, 1998. No petition for rehearing was filed.

POINTS RELIED UPON FOR REVERSAL

1. Until the appellate court's decision in this case, no Illinois court had ever permitted the exercise of *in personam* jurisdiction over a foreign defendant by attributing to that defendant the Illinois contacts of an alleged co-conspirator. Notwithstanding that absence of precedent, the appellate court here found jurisdiction on the basis of a bare allegation of conspiracy, lacking any facts whatsoever. The appellate court stated, "[a]lthough the complaints alleged no facts as to how the conspiracy came about, other than that the named conspirators 'conspired,' the allegation is sufficient to overcome a challenge to personal jurisdiction." (Opinion at 14) In *Rush v. Savchuk*, 444 U.S. 320, 331-332 (1980), the United States Supreme Court held that it "is plainly unconstitutional" to determine that a court has *in personam* jurisdiction over a defendant by attributing to that defendant the contacts of another defendant with the forum because "[t]he requirements of *International Shoe [Co. v. Washington*, 326 U.S. 310 (1945)] . . . must be met *as to each defendant* over whom a state court exercises jurisdiction [emphasis added]." In *Green v. Advance Ross Electronics Corp.*, 86 Ill. 2d 431, 440 (1981), this Court stated that "[i]t is not true that if one conspirator is

subject to Illinois jurisdiction so are all the others." The appellate court's decision in the present case is thus contrary to both the U.S. Supreme Court's holding in *Rush* and this Court's statement of the law in *Green*. The appellate court's decision is also contrary to well reasoned decisions in other jurisdictions such as California, Texas, and Washington which have held that contacts with the forum by an alleged co-conspirator cannot provide the basis for the exercise of *in personam* jurisdiction.

2. To the extent that some courts other than Illinois state courts have held that *in personam* jurisdiction can be exercised over a defendant by attributing to that defendant the contacts with the forum of an alleged co-conspirator, "[t]he cases are unanimous that a bare allegation of a conspiracy between the defendant and a person within the personal jurisdiction of the court is not enough." *Ahmed v. Quinn*, 124 F.3d 303, 1997 WL 471335 (7th Cir. Aug. 13, 1997), quoting *Stauffer v. Bennett*, 969 F.2d 455, 460 (7th Cir. 1992). Therefore, even if the conspiracy theory of jurisdiction is viable under some circumstances, the appellate court erred by holding that *in personam* jurisdiction can be exercised over a defendant based solely on the bare allegation that defendant "conspired" with co-conspirators having Illinois contacts. To permit the appellate court's decision to stand would be to unloose torrents of litigation in Illinois. Without any burden to allege facts other than that a defendant "conspired", plaintiffs will be able to name any defendant they want in Illinois actions. Illinois would thus become the most permissive jurisdiction by far and would inevitably be the forum of choice for plaintiffs seeking to obtain jurisdiction over foreign defendants.

3. In the dispute over jurisdiction in this case, in which plaintiff asserts that Charter engaged in a purported conspiracy which allegedly caused plaintiff to suffer injuries resulting from exposure to asbestos and asbestos-containing materials, Charter submitted a very specific, very detailed, ten page affidavit, in which a longtime Charter officer stated that Charter (a) has never had any contacts with Illinois, (b) has never directly or indirectly operated, managed, or even

consulted with any company with any connection to asbestos, and (c) neither ever engaged in any conspiracy nor ever had any agency relationship with any of the other defendants or with any asbestos-related company. Plaintiff neither refuted any of the facts stated in this affidavit nor submitted any counter-affidavits. Fundamental principles hold that "notwithstanding contrary averments in [plaintiff's] pleadings . . . [i]f a defendant's affidavit contesting jurisdiction is not refuted by a counter-affidavit filed by the plaintiff, the facts alleged in the defendant's affidavit are accepted as true." *Kutner v. DeMassa*, 96 Ill. App. 3d 243, 248 (1st Dist. 1981). In particular, if a defendant files an affidavit which "denies [its] involvement in any agency or conspiracy," and the plaintiff fails to file a counter-affidavit controverting defendant's denial, then plaintiff fails to make the showing required to subject the defendant to jurisdiction based on the conspiracy. *Kutner*, 96 Ill. App. 3d at 248. The affidavit submitted by Charter thus establishes as a matter of law – regardless of the constitutional issues raised here – that Charter is not subject to *in personam* jurisdiction based on allegations that it participated in a purported asbestos-related conspiracy.

The appellate court erred by disregarding this affidavit as "conclusory" because: (a) the affidavit expressly "denies [Charter's] involvement in any agency or conspiracy," which is all that *Kutner* requires; (b) the affidavit's statements denying that Charter engaged in the purported conspiracy include the maximum specificity possible given the bareness of the allegation; (c) the affidavit explains in detail that Charter could not have engaged in such a conspiracy; and (d) constitutional due process requirements prohibit the fundamentally unjust framework created by the appellate court in this case because it will result in the exercise of *in personam* jurisdiction over defendants with no factual inquiry into the sufficiency of their contacts with Illinois.

STATEMENT OF FACTS

I. PROCEDURAL BACKGROUND

Plaintiff's complaint asserts that certain defendants engaged in a purported conspiracy which allegedly caused plaintiff to suffer injuries resulting from exposure to asbestos and asbestos-containing materials. (R. 3-8 (A033-38)) On November 14, 1996, Charter filed a special and limited appearance and a motion to dismiss plaintiff's complaint for lack of personal jurisdiction. (R. 249 – 403) In support of its motion, Charter submitted the affidavit of Peter M. Thwaite ("Thwaite Aff."), the Company Secretary of Charter. (R. 291 – 300, ¶ 1 (A023-32, ¶ 1))

In response to plaintiff's discovery requests, Charter produced voluminous documents and presented Thwaite for a day-long deposition. (R. 465 – 885) Notwithstanding Thwaite's deposition testimony and Charter's production of hundreds of documents, plaintiff neither filed any counter-affidavits nor submitted any other evidence in opposition to Charter's motion, choosing instead to rely solely on the allegations in the complaint. (R. 890-925)

On April 28, 1997, the circuit court denied Charter's motion. (R. 926 (A022)) On July 8, 1997, the appellate court granted Charter's petition pursuant to S. Ct. R. 306(a)(3) for leave to appeal. On May 29, 1998, the appellate court affirmed the circuit court's order. Charter now petitions for leave to appeal to this Court.

II. THE UNDISPUTED FACTS

A. Charter Is A United Kingdom Corporation And Has Never Had Any Contacts With Illinois.

As Thwaite stated in his affidavit – an affidavit which plaintiff has neither refuted by filing counter-affidavits nor controverted by submitting any other evidence – Charter is incorporated under the laws of the United Kingdom, has its place of business in the United Kingdom, and has never had any contacts with Illinois:

2. . . . In this Affidavit, I will refer to Charter Consolidated P.L.C. and defendant Charter plc, collectively as "Charter." Where reference is made to Charter Consolidated P.L.C. or Charter plc individually, I will do so using their full corporate names.

6. Charter Consolidated P.L.C. was incorporated under the laws of the United Kingdom in 1964. In 1993, pursuant to a reorganization of the company, Charter plc was formed and acquired all of the outstanding stock of Charter Consolidated P.L.C. Charter plc currently holds 100 percent of the stock of Charter Consolidated P.L.C. Charter plc is a publicly held company having its place of business at 7 Hobart Place, London, England. Its shares are traded on the London Stock Exchange. Following the company reorganization in 1993, the stock of Charter Consolidated P.L.C. ceased to be traded publicly.

7. . . . Charter does not conduct any business of any kind in Illinois. Charter has never been qualified to do business in Illinois, nor has Charter ever obtained a certificate of authority to transact business in Illinois. Charter has never entered into a contract to be performed in Illinois. Charter has never maintained an office in Illinois. No directors, officers, or employees of Charter have ever resided in Illinois. Charter has never owned or leased real property in Illinois. Charter has never maintained a post office box or telephone in Illinois. It has never had a registered agent for service of process in Illinois. Charter has never had a bank account in Illinois. It has never advertised in Illinois. It has never paid taxes or franchise fees or commenced lawsuits in Illinois.

(Thwaite Aff., ¶¶ 2, 6, 7 (R. 291-294 (A0023-26)))

B. Charter's Has Never Directly Or Indirectly Operated, Managed, Or Consulted With Any Company With Any Connection To Asbestos.

Charter's business, along with its wholly owned subsidiaries, is real estate, investment securities, and corporate finance:

> 8. Charter plc is an investment holding company. Charter plc has subsidiaries located at 7 Hobart Place which, among other things: own and develop real property in the United Kingdom; buy, sell, and hold investments; deal in securities; and engage in corporate financing. Charter plc and its wholly owned subsidiaries at 7 Hobart Place, London, have 41 employees.
>
> 9. Among Charter plc's subsidiaries are wholly owned United Kingdom finance and investment companies. These investment subsidiaries buy, sell, and hold investments. Charter plc's wholly owned investment subsidiaries have acquired, for investment purposes, shares in hundreds of companies located in England and other countries, and the extent of their holdings in such companies ranges from a fraction of one percent to 100 percent. The companies in which Charter has invested are highly diversified; currently, Charter's investments are principally engaged in industrial activities.

(Thwaite Aff., ¶¶ 8, 9 (R. 294-295 (A0026-27)))

As explained in fourteen detailed paragraphs covering five pages of Thwaite's affidavit, Charter never directly or indirectly operated or managed any company with any connection to asbestos. (Thwaite Aff., ¶¶ 10-23 (R. 295-299 (A027-31))) Instead, the only connections with asbestos or asbestos-containing products that Charter has ever had are the following:

(a) Past indirect ownership of some of the shares of Cape P.L.C (formerly known as Cape Industries P.L.C.) ("Cape"), a publicly held company which, until 1979, owned shares of companies which mined and marketed asbestos;

(b) Nomination of two or three members of Cape's board of directors – never a majority; and

(c) As required by the law of the United Kingdom and until Charter sold its shares of Cape, consolidation of Cape's earnings with Charter's for accounting purposes – although Cape always issued separate financial statements.

(Thwaite Aff., ¶¶ 10-13, 14, 18, 20-21 (R. 295-298 (A027-30)))

Furthermore, Charter's relationship with Cape was extremely limited:

(a) From 1969 to 1979, one member of Cape's management served on Charter's board, which varied from ten to twenty directors prior to 1993; no member of Cape's management has served on Charter's board since 1980;

(b) No Charter nominee or employee was ever an officer of Cape or otherwise managed Cape's affairs;

(c) The meetings of the boards of directors and shareholders of Charter and Cape were always separate;

(d) Charter has never loaned money to Cape, guaranteed loans to Cape, or paid Cape's operating expenses; and

(e) Charter and Cape always engaged in entirely different kinds of business, from separate offices, using separate facilities, and kept separate books and bank accounts.

(Thwaite Aff., ¶¶ 14-17, 19 (R. 296-298 (A028-30)))

As explained in another two detailed paragraphs of Thwaite's affidavit, other than owning shares of Cape, Charter never had any connection of any kind to the ownership, management, or operation of Cape's subsidiaries which mined and sold asbestos. (Thwaite Aff., ¶¶ 22, 23 (R. 298-299 (A030-31))) In particular, as Thwaite stated in part of paragraph 23 of his affidavit, "Charter has never been consulted by Cape or by any of Cape's subsidiaries" concerning any asbestos-related matters.

> 23. . . . *Charter has never been consulted* by Cape or by any of Cape's subsidiaries *concerning the mining, marketing, prospecting, or sale of asbestos*, nor has Charter ever been consulted with regard to long-term policy matters such as technical or mining development. *Charter has never been consulted* by any Cape subsidiary *concerning such matters as advertising, promotion, customers, development, supply, distribution, capital expenditures, pricing, or personnel issues. . . .*

(Thwaite Aff., ¶ 23 (R. 299 (A031)) (emphasis added))

C. Thwaite's Affidavit Denies – With Maximum Possible Specificity – Plaintiff's Bare Allegation Of Conspiracy.

Plaintiff bases the assertion that Charter is subject to *in personam* jurisdiction on an allegation that Charter engaged in an asbestos-related conspiracy. However, as the appellate court conceded, the complaint alleges "no facts as to how the conspiracy came about, other than that the named conspirators 'conspired.' " (Opinion at 14) Specifically, plaintiff's complaint omits Charter from the list of "Co-Conspirators" contained in paragraph 2 of the Complaint. (Complaint, ¶¶ 2-3 (R. 3 (A033))) Instead, Charter is defined as a "Defendant" and not as a "Co-Conspirator." (Complaint at 1 (R. 3 (A033))) Insofar as the complaint states that the Co-Conspirators conspired with each other and with the other Defendants, the complaint fails to specify which of the Defendants were members of the conspiracy or, more importantly, how any of the Defendants participated in the conspiracy. (Complaint, ¶¶ 8-15 (R. 4-7 (A034-37))) Indeed, the Complaint does not even purport to make particularized allegations, stating instead that "[o]ne or more" unspecified Co-Conspirators or Defendants committed various overt acts. (Complaint, ¶ 15 (R. 5-6 (A035-36))) Charter is not identified as committing *any* act in connection with the conspiracy, nor are any facts alleged concerning Charter's knowledge of or participation in the conspiracy. (Complaint, ¶¶ 8-15 (R. 4-7 (A034-37)))

In response to this most general of allegations, Thwaite directly denied that Charter engaged in the alleged conspiracy – with the maximum specificity possible given the bareness of the allegation. (Thwaite Aff., ¶¶ 4, 24 (R. 292-293, 300 (A0024-25, 32))) In his affidavit, Thwaite also explained with great specificity that Charter could not have engaged in such a conspiracy because, as set forth above, Charter has never directly or indirectly been in the asbestos business, has never operated or managed Cape or any other company with any connection to asbestos, has never been consulted by Cape or by any of Cape's subsidiaries concerning any asbestos-related matter, and instead only indirectly owned shares in Cape, which owned shares in asbestos-related companies until 1979. (Thwaite Aff. ¶¶ 10-23 (R. 295-299 (A027-31)))

ARGUMENT

I. THIS PETITION SHOULD BE GRANTED BECAUSE CONSTITUTIONAL DUE PROCESS REQUIREMENTS BAR THE EXERCISE OF *IN PERSONAM* JURISDICTION OVER CHARTER, WHICH HAS NO ILLINOIS CONTACTS, BASED SOLELY ON THE ILLINOIS CONTACTS OF ALLEGED CO-CONSPIRATORS.

The appellate court held that an Illinois court may exercise *in personam* jurisdiction over Charter, which has no Illinois contacts, based solely on the Illinois contacts of alleged co-conspirators. (Opinion at 14)[1] Until the appellate court's decision in this case, no Illinois court had ever permitted the exercise of *in personam* jurisdiction over a defendant having no Illinois contacts by attributing to that defendant the Illinois contacts of an alleged co-conspirator. As set forth below, constitutional due process requirements bar the exercise of *in personam* jurisdiction over Charter, establish that the appellate court erred, and mandate both the reversal of the appellate court's decision and the dismissal of plaintiff's complaint as against Charter.

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[1] The appellate court did not address the issue of whether *in personam* jurisdiction could be exercised over Charter based on either Charter's relationship with Illinois or Charter's tenuous relationship with asbestos-related companies, shares of which were formerly indirectly owned by Cape, of which Charter indirectly owned shares between 1965 and 1996. However, both Thwaite's unrefuted affidavit (*see* Sections II.A and B of the Statement of Facts) – and repeated findings by Illinois courts –

The Due Process Clause of the Fourteenth Amendment to the United States Constitution permits a court to exercise *in personam* jurisdiction over a non-resident defendant "only if the defendant has 'certain minimum contacts with [the forum] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." ' " *Rush v. Savchuk*, 444 U.S. 320, 327 (1980), quoting *International*

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establish that Charter has never had any contacts with Illinois and that there is no basis to exercise *in personam* jurisdiction over Charter based on its tenuous relationship with the asbestos-related companies, formerly owned by Cape, of which Charter formerly indirectly owned shares. *Mohn v. International Vermiculite Co.*, 147 Ill. App. 3d 717, 718 (4th Dist. 1986); *Wehmeier v. UNR Indus.*, No. 82-L-80 (McLean County, Ill., Nov. 27, 1985); *Gowen v. Unarco Indus.*, No. 83-L-140 (McLean County, Ill., Nov. 27, 1985); *Lafever v. Unarco Indus.*, No. 84-L-224 (McLean County, Ill., Nov. 27, 1985); *Robbins v. Brakegate, Ltd.*, No. 83-L-300 (McLean County, Ill., Dec. 1, 1988); *Denham v. Unarco Indus.*, No. 85-L-360 (McLean County, Ill., Dec. 1, 1988); *Kessinger v. Unarco Indus.*, No. 85-L-359 (McLean County, Ill., Dec. 1, 1988); *Hammond v. Unarco Indus.*, No. 86-L-128 (McLean County, Ill., Dec. 1, 1988); *Wolford v. Unarco Indus.*, No. 87-L-104 (McLean County, Ill., Dec. 1, 1988); *Kessinger v. North American Asbestos Corp.*, No. 87-L-120 (McLean County, Ill., Dec. 1, 1988); *Swank v. Brakegate, Ltd.*, No. 87-L-292 (McLean County, Ill., Dec. 1, 1988); *Smith v. Brakegate, Ltd.*, No. 87-L-293 (McLean County, Ill., Dec. 1, 1988); *Hernandez v. Brakegate, Ltd.*, 87-L-294 (McLean County, Ill., Dec. 1, 1988); *Adcock v. Brakegate, Ltd.*, No. 87-L-306 (McLean County, Ill., Dec. 1, 1988); *Johnson v. Charter Consolidated, P.L.C.*, No. 89-L-187 (McLean County, Ill., Jan. 31, 1990). (Copies of all of these decisions are included in the Separate Appendix filed with the appellate court (A002-188).)

Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) "The requirements of *International Shoe* . . . must be met *as to each defendant* over whom a state court exercises jurisdiction [emphasis added]." *Rush*, 444 U.S. at 332.[2] Accordingly, it "is plainly unconstitutional" to determine that a court has *in personam* jurisdiction over a defendant by attributing to that defendant the contacts of another defendant with the forum. *Rush*, 444 U.S. at 331-332; *see also Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 fn.13 (1984) ("Each defendant's contacts with the forum State must be assessed individually").

Consistent with the United States Supreme Court's interpretation of constitutional due process requirements in *Rush*, this Court in *Green v. Advance Ross Electronics Corp.*, 86 Ill. 2d 431, 440 (1981), stated that "[i]t is not true that if one conspirator is subject to Illinois jurisdiction so are all the others."[3]

Well reasoned decisions in other jurisdictions such as California, Texas, and Washington have similarly held that contacts with the forum by an alleged co-conspirator cannot provide the basis for the exercise of *in personam* jurisdiction. *National Industrial Sand Assoc. v. Gibson*, 897 S.W.2d 769,

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[2] When, as in the present case, the defendant is located outside the United States, due process concerns are heightened and "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Asahi Metal Indus. Co. v. Superior Ct. Of California, Solano County*, 480 U.S. 102, 115 (1987).

[3] The absence of any allegation in plaintiff's complaint that any of the other defendants were Charter's agents, and the unrefuted statement in the affidavit submitted by Charter that none "of the other defendants named in the complaint ever acted as an agent of Charter" (R. 300, ¶ 24 (A032)), render it unnecessary to consider whether an agency relationship between co-conspirators could provide the basis for the exercise of *in personam* jurisdiction, as the Court stated in *Green* that one might argue. *Green*, 86 Ill. 2d at 440-41 ("the theory of jurisdiction based on the acts of a co-conspirator must be that co-conspirators are each others' agents; thus the argument would be that when a conspirator commits a tortious act within Illinois he does so as agent for his co-conspirators, who thereby also become subject to this State's jurisdiction").

773 (Tex. S. Ct. 1995) (holding based on *Rush* that "we decline to recognize the assertion of personal jurisdiction over a non-resident defendant based solely upon the effects or consequences of an alleged conspiracy with a resident in the forum state"); *Mansour v. Superior Court*, 38 Cal. App. 4th 1750, 1760, 46 Cal. Rptr. 2d 191, 197 (4th Dist. 1995) ("California does not recognize conspiracy as a basis for acquiring personal jurisdiction over a party"); *Hewitt v. Hewitt*, 78 Wash. App. 447, 455, 896 P.2d 1312, 1316 (Div. 1 1995) (holding in a conspiracy case that "we find that imputed conduct is a connection too tenuous to warrant the exercise of personal jurisdiction").

Under the United States Supreme Court's holding in *Rush* and this Court's statement of the law in *Green*, constitutional due process requirements bar the exercise of *in personam* jurisdiction over Charter.

II. THIS PETITION SHOULD BE GRANTED BECAUSE, AS A MATTER OF LAW, PLAINTIFF'S BARE ALLEGATION THAT CHARTER CONSPIRED WITH CO-CONSPIRATORS HAVING ILLINOIS CONTACTS FAILS TO PROVIDE A SUFFICIENT BASIS TO EXERCISE *IN PERSONAM* JURISDICTION OVER CHARTER, WHICH HAS NO ILLINOIS CONTACTS.

The appellate court held that *in personam* jurisdiction can be exercised over Charter based solely on the bare allegation that Charter "conspired" with other defendants having Illinois contacts. (Opinion at 14 ("Although the complaints alleged no facts as to how the conspiracy came about, other than that the named conspirators 'conspired,' the allegation is sufficient to overcome a challenge to personal jurisdiction"). To the extent that *in personam* jurisdiction can be exercised over a defendant by attributing to that defendant the contacts with the forum of an alleged co-conspirator, plaintiff's bare allegation as a matter of law fails to provide a sufficient basis to exercise *in personam* jurisdiction over Charter.

In those courts in which the conspiracy theory of jurisdiction has been accepted, "[t]he cases are unanimous that a bare allegation of a conspiracy between the defendant and a person within the personal jurisdiction of the court is not enough" to permit a court to exercise jurisdiction over that defendant. *Ahmed v. Quinn*, 124 F.3d 303, 1997 WL 471335 at *3 (7th Cir. Aug. 13, 1997), quoting *Stauffer v. Bennett*, 969 F.2d 455, 460 (7th Cir. 1992); *see e.g. Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1031 (D.C. Cir. 1997) (" 'bare speculation' or a 'conclusionary [sic] statement' that individuals are co-conspirators is insufficient to establish personal jurisdiction under a conspiracy theory"); *General Motors Corp. v. Ignacio Lopez de Arriortua*, 948 F. Supp. 656, 664 (E.D. Mich. 1996) ("Totally unsupported conspiracy allegations do not support jurisdiction"); *Chandler v. Barclays Bank PLC*, 898 F.2d 1148, 1155 (6th Cir. 1990) ("[T]otally unsupported allegations of conspiracy cannot constitute sufficient contacts . . . to justify an exercise of personal jurisdiction"); *Boon Partners v. Advanced Financial Concepts, Inc.*, 917 F. Supp. 392, 397 (E.D.N.C. 1996) ("conclusory allegations of a conspiracy . . . are insufficient to create jurisdiction under the 'conspiracy theory of personal jurisdiction,' a theory not yet adopted by the Fourth Circuit"), citing *McLaughlin v. McPhail*, 707 F.2d 800, 807 (4th Cir. 1983); *Rudo v. Stubbs*, 221 Ga. App. 702, 704, 472 S.E.2d 515, 517-518 (1996) ("We agree with those courts requiring more than mere allegations of conspiracy (unless the allegations are unrefuted), lest a defendant over whom the exercise of jurisdiction would be unfair be forced to defend the conspiracy charge on the merits in order to belatedly establish the court's lack of jurisdiction"); *American Land Program, Inc. v. Bonaventura Uitgevers Maatschappij, N.V.*, 710 F.2d 1449, 1454 (10th Cir. 1983) ("Mere allegations of conspiracy, without some sort of prima facie factual showing of a conspiracy, cannot be the basis of personal jurisdiction of [sic] co-conspirators outside the territorial limits of the court"); *see also Cleft of the Rock Foundation v. Wilson*, 992 F. Supp. 574, 582 (E.D.N.Y. 1998) ("the bland assertion of conspiracy or agency is insufficient to establish jurisdiction" under the New York long arm statute), quoting *Lehigh Valley Industries, Inc. v. Birenbaum*, 527 F.2d 87, 93-94 (2d Cir. 1975).

It is thus fundamental that plaintiff's bare allegation that Charter "conspired" with co-conspirators having Illinois contacts cannot provide a sufficient basis for the exercise of *in personam* jurisdiction over Charter. It is also fundamental that plaintiff has the burden of establishing *in personam* jurisdiction over Charter. *R.W. Sawant & Co. v. Allied Programs Corp.*, 111 Ill. 2d 304, 310 (1986). Having submitted neither counter-affidavits nor any other evidence, the inability of plaintiff's complaint to provide a sufficient basis for the exercise of *in personam* jurisdiction establishes that plaintiff has failed to meet this burden. The appellate court's erroneous reliance on plaintiff's bare allegation that Charter "conspired" with co-conspirators having Illinois contacts thus requires both the reversal of the appellate court's decision and the dismissal of plaintiff's complaint as against Charter.

The impact of permitting the appellate court's decision to stand should not be underestimated. If Illinois permits the exercise of *in personam* jurisdiction on the strength of a bare pleading that a defendant "conspired" with a defendant who has Illinois contacts, Illinois courts will thereby become the most permissive in the nation on jurisdictional issues. Why should plaintiffs struggle with concepts of minimum contacts and due process in other states if they can sue in Illinois and satisfy all jurisdictional requirements simply by pleading a conspiracy? The theory of conspiracy jurisdiction – stripped of all requirements that the conspiracy be pled with particularity as to each defendant and that plaintiff must meet and overcome the affidavit or other evidence presented by the defendant – is too tempting an invitation for plaintiffs. Such a legal theory, if adopted in Illinois, will inevitably turn the Land of Lincoln into the Land of Litigation.

III. THIS PETITION SHOULD BE GRANTED BECAUSE THWAITE'S UNREFUTED AFFIDAVIT ESTABLISHES AS A MATTER OF LAW THAT CHARTER DID NOT ENGAGE IN THE ALLEGED CONSPIRACY, WHICH THUS CANNOT PROVIDE ANY BASIS TO EXERCISE *IN PERSONAM* JURISDICTION OVER CHARTER.

In response to plaintiff's bare allegation of conspiracy, Charter submitted the Thwaite affidavit, in which Thwaite directly denied that Charter engaged in the purported conspiracy. (Thwaite Aff., ¶¶ 4, 24 (R. 292-293, 300 (A0024-25, 32))) In his affidavit, Thwaite also explained with great specificity – in fourteen paragraphs covering five pages – that Charter could not have engaged in such a conspiracy because Charter has never directly or indirectly been in the asbestos business, has never operated or managed Cape or any other company with any connection to asbestos, has never been consulted by Cape or by any of Cape's subsidiaries concerning any asbestos-related matter, and instead only indirectly owned shares in Cape, which owned shares in asbestos-related companies until 1979. (Thwaite Aff. ¶¶ 10-23 (R. 295-299 (A027-31))) On the contrary, Charter is a United Kingdom corporation, which has never had any contacts with Illinois, and which (through its wholly owned subsidiaries) is in the businesses of real estate, investment securities, and corporate finance. (Thwaite Aff., ¶¶ 2, 6-9 (R. 291-295 (A023-27)))

Notwithstanding Thwaite's detailed affidavit and extensive deposition testimony and Charter's production of voluminous documents, plaintiff neither filed any counter-affidavits nor submitted any other evidence to refute any of the facts in Thwaite's affidavit, choosing instead to rely solely on the allegations in the complaint. (R. 890-925) Fundamental principles hold that "notwithstanding contrary averments in [plaintiff's] pleadings . . . [i]f a defendant's affidavit contesting jurisdiction is not refuted by a counter-affidavit filed by the plaintiff, the facts alleged in the defendant's affidavit are accepted as true." *Kutner v. DeMassa*, 96 Ill. App. 3d 243, 248, 421 N.E.2d 231, 235 (1st Dist. 1981). In particular, if a defendant files an affidavit which "denies [its] involvement in any agency or conspiracy," and the plaintiff fails to file a counter-affidavit controverting defendant's denial, then plaintiff fails to make the showing required to subject the defendant to jurisdiction based on the conspiracy. *Kutner*, 96 Ill. App. 3d at 248, 421 N.E.2d at 235.

Thwaite's unrefuted affidavit "denies [Charter's] involvement in any agency or conspiracy" – both (a) by directly denying that Charter engaged in the alleged conspiracy (or had any agency relationship) with any of the other defendants or with any asbestos-related company, and (b) by explaining with great specificity that Charter could not have engaged in such a conspiracy – because Charter never directly or indirectly operated, managed, or even consulted with any company with any connection to asbestos. Thwaite's affidavit therefore establishes as a matter of law that Charter is not subject to *in personam* jurisdiction based on allegations that it participated in a purported asbestos-related conspiracy.

The appellate court erred by disregarding Thwaite's affidavit as "conclusory." First, the affidavit expressly "denies [Charter's] involvement in any agency or conspiracy," which is all that *Kutner* requires. Second, the affidavit's statements denying that Charter engaged in the purported conspiracy include the maximum specificity possible given the bareness of the allegation. In other words, although the affidavit is more specific than the complaint's conspiracy allegation, the bareness of complaint's conspiracy allegation prevents the affidavit from denying any other specific facts about Charter's purported participation in the alleged conspiracy because the complaint has not alleged any such facts. Third, the affidavit's detailed explanation that Charter could not have engaged in such a conspiracy – because Charter never directly or indirectly operated, managed, or even consulted with any company with any connection to asbestos – precludes any determination that Thwaite's affidavit is conclusory.

Finally, constitutional due process requirements prohibit the fundamentally unjust framework created by the appellate court in this case, whereby a defendant's affidavit denying a plaintiff's bare allegation of conspiracy is to be disregarded as "conclusory" while the bare allegation is found to be sufficient to permit the exercise *in personam* jurisdiction. Unlike federal law, in which "the issue of personal jurisdiction is fully litigated on the merits during trial," Illinois law provides that "the special appearance . . . is a defendant's 'sole opportunity to defeat the jurisdiction of the court.' " *Finnegan v. Les Pourvoiries Fortier, Inc.*, 205 Ill. App. 3d 17, 25 (1st Dist. 1990) (quoting 3 R. Michael, § 6.2 at 61). Accordingly, if a non-resident defendant challenges a plaintiff's assertion that the defendant is subject to *in personam* jurisdiction, the plaintiff must prove jurisdiction by a preponderance of the evidence. *Finnegan*, 205 Ill. App. 3d at 25; *see also Campbell v. Mills*, 262 Ill. App. 3d 624, 626-27, (5th Dist. 1994); *Johnson v. Ortiz*, 244 Ill. App. 3d 384, 388, (1st Dist. 1993); *People ex rel. Hartigan v. Kennedy*, 215 Ill. App. 3d 880, 890, (1st Dist. 1991). If a defendant's unrefuted affidavit denying a bare allegation of conspiracy is to be disregarded as "conclusory" and does not defeat the assertion of *in personam* jurisdiction (i.e., does not establish that plaintiff has failed to prove jurisdiction by a preponderance of the evidence), it will never be possible for any defendant to defeat the assertion of *in personam* jurisdiction if the plaintiff merely includes in the complaint a bare allegation of conspiracy – regardless of whether the defendant in fact does not have sufficient contacts with Illinois. Therefore, the constitutional due process requirements of *International Shoe* prohibit the fundamentally unjust framework created by the appellate court's decision in this case because this framework will result in the exercise of *in personam* jurisdiction over defendants with no factual inquiry into the sufficiency of their contacts with Illinois.

CONCLUSION

For the reasons set forth above, the Court should grant Charter leave to appeal, reverse the appellate court's decision, and dismiss plaintiff's complaint as against Charter.

Respectfully submitted,

Charter plc

By: /s/ David M. Simon
One of its attorneys

John E. Frey
David Simon
Wildman, Harrold Allen & Dixon
225 Wacker Drive
Chicago, Illinois 60606-1229
(312) 201-2000

Of Counsel:
Werner L. Polak
Stephen Fishbein
Shearman & Sterling
599 Lexington Avenue
New York, New York 10022
(212) 848-4000

No. 4-97-0385

IN THE
Appellate Court of Illinois
Fourth District

MARGE CAMERON, Individually and as Special Administrator of the Estate of J. Bernard Latta, deceased, *Plaintiff-Appellee,* *v.* **OWENS-CORNING FIBERGLAS CORPORATION, et al.,** *Defendants,* *and* **CHARTER PLC,** *Defendant-Appellant.*	)	Appeal from the Circuit Court of the Eleventh Judicial Circuit, McLean County, Illinois McLean County No. 95 L 112 The Honorable **Ronald C. Dozier,** Judge Presiding.

APPELLANT CHARTER PLC'S BRIEF IN SUPPORT OF ITS APPEAL FROM DENIAL OF ITS MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

WILDMAN, HARROLD, ALLEN
& DIXON
JOHN E. FREY
DAVID M. SIMON
225 WEST WACKER DRIVE
SUITE 3000
CHICAGO, ILLINOIS 60606-1229
(312) 201-2000

SHEARMAN & STERLING
WERNER L. POLAK
STEPHEN FISHBEIN
153 EAST 53RD STREET
NEW YORK, NEW YORK 10022
(212) 848-4000

Attorneys for
Defendant-Appellant, Charter plc

ORAL ARGUMENT REQUESTED

NATURE OF THE ACTION

This action was brought by the plaintiff to recover damages for injuries allegedly suffered as a result of exposure to asbestos and asbestos-containing materials. Defendant Charter plc ("Charter") is an investment holding company located in the United Kingdom, which has never engaged in any aspect of the asbestos business nor conducted business of any kind in the United States.

On November 14, 1996, Charter filed a special and limited appearance and a motion to dismiss plaintiff's Complaint[1] for lack of personal jurisdiction (R. C 249-403)[2] Charter's motion was supported by the affidavit of Peter M. Thwaite (the "Thwaite Affidavit") (included in the attached Appendix at A006-15). Mr. Thwaite is Charter's Company Secretary and keeper of its records. (A006-15) (R. C 291-300, 769) On April 28, 1997, without making any specific findings, the lower court entered an order denying Charter's motion to dismiss. (A005) (R. C 926) Pursuant to Supreme

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[1] A copy of the Complaint is included in the attached Appendix at A016-21.

[2] Pursuant to Illinois Supreme Court Rule 328, a Supporting Record was filed with Charter's Petition for Leave to Appeal the Denial of Its Motion to Dismiss for Lack of Personal Jurisdiction on May 16, 1997. Accordingly, all record citations within Charter's Appellate Brief will be to the Supporting Record previously submitted.

Court Rule 306(a)(3), Charter petitioned this Court for leave to appeal the denial of its motion to dismiss. Charter's petition was granted on July 8, 1997.

ISSUE PRESENTED FOR REVIEW

Did the circuit court err by denying Charter's motion to dismiss for lack of personal jurisdiction?

JURISDICTION

On April 28, 1996, the circuit court denied Charter's motion to dismiss plaintiff's Complaint, brought pursuant to its special and limited appearance, for lack of personal jurisdiction. (A005) (R. C 926) Pursuant to Illinois Supreme Court Rule 306, a party may petition the Appellate Court for leave to appeal the order of a trial court which denies a motion to dismiss contesting the *in personam* jurisdiction of the court. S. Ct. Rule 306(a)(3). On May 16, 1997, Charter petitioned this Court for leave to appeal the denial of its motion to dismiss. The petition was granted by this Court on July 8, 1997. This Court thus has jurisdiction to review the order of the court below.

STATEMENT OF FACTS

A. Procedural History

On April 5, 1995, plaintiff caused a summons and the Complaint to be served on National Mine Service, Inc. Charter had no affiliation with National Mine Service, Inc. (R. C 21-22) Accordingly, Charter filed a special and limited appearance and a Motion to Quash Service of Process. (R. C 9-22)

On August 8, 1995, plaintiff caused an alias summons and the Complaint to be served on Distribution Mining, Inc., by its registered agent CT Corporation System. (R. C 78-112) Neither CT Corporation System, nor Distribution Mining, the shares of which are indirectly held by Charter, is either the registered agent of Charter or an agent of Charter authorized to accept service on behalf of Charter or otherwise. (R. C

57-58, 78-80) Accordingly, Charter filed a Motion to Quash Service of Alias Summons. (R. C 49-112)

On October 18, 1996, the Circuit Court denied Charter's motion to quash service. (R. C 936-937) On November 14, 1996, Charter filed a special and limited appearance and a motion to dismiss the Complaint for lack of personal jurisdiction. (R. C 249-403) Charter's motion to dismiss was supported by the Thwaite Affidavit. (A006-15) (R. C 291-300, 769) In response to notice served by plaintiff, Charter presented Mr. Thwaite for deposition on February 19, 1997. (R. C 465-885) Prior to and at the time of the deposition, Charter produced voluminous documents which plaintiff had requested. (R. C 551-554)

Prior to the hearing on Charter's motion to dismiss, plaintiff made a series of motions directed to it. First plaintiff moved to strike the motion to dismiss because, according to plaintiff, Charter had waived its right to make a motion based on lack of personal jurisdiction by first bringing, and losing, the motion to quash service. (R. C 405-406) The lower court denied this motion on April 16, 1997. (R. C 941) On January 14, 1997, plaintiff filed a motion to strike the Thwaite Affidavit on grounds that it did not comply with the personal knowledge, specificity, and other requirements of Supreme Court Rule 191(a). That motion was denied just prior to the hearing on the motion to dismiss on April 28, 1997. (A005) (R. C 926) Also on April 28, the lower court denied plaintiff's motions to strike Charter's response to plaintiff's motion to strike the Thwaite Affidavit and Exhibit D to Charter's response (excerpts and exhibits from the deposition of Mr. Thwaite). (A005) (R. C 926)

Finally, without making any specific findings, the lower court entered an order denying Charter's motion to dismiss. (A005) (R. C 926) Pursuant to Supreme Court Rule 306(a)(3), Charter petitioned this Court for leave to appeal the denial of its motion to dismiss. Charter's petition was granted on July 8, 1997.

B. Undisputed Facts Presented to the Circuit Court

1. Charter And Its Business

Charter is an investment holding company, incorporated in 1964 under the laws of the United Kingdom as Charter Consolidated P.L.C. In 1993, Charter plc was formed and acquired all of the shares of Charter Consolidated P.L.C. Charter plc is publicly held and its shares are traded on the London Stock Exchange. Its place of business is 7 Hobart Place, London, England. Charter and its wholly-owned subsidiaries at its headquarters have 41 employees. (Thwaite Aff., ¶¶ 7-8 (A006-15) (R. C 291-300))

a. Charter Has Had No Contacts With Illinois

Charter has had no contacts with Illinois that could subject it to *in personam* jurisdiction in this State. Charter has never been registered or qualified to do business in Illinois, and it has never maintained an office in Illinois. No director, officer, or employee of Charter has ever resided or conducted business in Illinois. Charter has never owned or leased real property, maintained a post office box or telephone, or advertised in the State of Illinois. Charter has never had a registered agent for service of process here, and it has never paid taxes or franchise fees or commenced a lawsuit in Illinois. (R. C 291-300 (A006-15), ¶ 6)

b. Charter Has Never Engaged In The Asbestos Business

Charter has never engaged in any aspect of the asbestos business. It has never mined, manufactured, distributed, supplied or sold asbestos or asbestos-containing products in the United States or anywhere else. (R. C 291-300 (A006-15), ¶ 4)

2. Cape P.L.C.

Cape P.L.C. ("Cape") is a holding company which was incorporated in 1893 under the laws of the United Kingdom and which was also named as a defendant in the Complaint. (A016) (R. C 3). Cape is publicly held, and its stock is traded on the London Stock Exchange. Cape's principal place of business is Cape House, Iver Lane, Uxbridge, Middlesex, England. Cape owns shares of stock in companies engaged in, among other things, industrial contracting and the manufacturing of building products. (R. C 291-300 (A006-15), ¶ 10)

Until June 1979, Cape indirectly owned companies that mined and marketed asbestos. The assets and/or shares of those companies were sold in June 1979 to a company unaffiliated with Cape or Charter. Since that time, Cape has neither directly nor indirectly engaged in the mining or marketing of asbestos. (*Id.*)

3. Charter's Investment Relationship With Cape

Cape had been a going concern for more than 70 years before Charter acquired an interest in it. Charter first acquired an indirect interest in Cape through one of three companies that Charter acquired in 1965, The Central Mining and Investment Corporation Limited ("CMIC"). At that time, CMIC indirectly owned 16.86 percent of Cape through its subsidiary, Central Mining Finance Limited. (R. C 291-300 (A006-15), ¶ 11)

From 1965 to 1969, Charter's interest in Cape increased to 25 percent through occasional open-market purchases by its wholly owned investment subsidiaries. In May 1969, Charter made a tender offer for 50 percent of the outstanding Cape shares not already owned by Charter's subsidiaries. As a result of this tender offer, Charter's interest, through its investment subsidiaries, increased to 62.5 percent in 1969. From 1969 to 1978, through open-market purchases and as an underwriter of issues of Cape stock, Charter's interest in Cape fluctuated, gradually increasing to 67.3 percent. In 1982, Charter Consolidated Investments Ltd. ("CCI"), a wholly owned subsidiary of Charter, acquired all the Cape shares held by CMF and became the only Charter subsidiary to hold Cape shares. Thereafter, Charter's holdings, through CCI, varied slightly because of the conversion of convertible preference shares. (R. C 291-300 (A006-15), ¶ 12)

Effective as of July 18, 1996, Charter sold all of its Cape shares, which then amounted to 65.3 percent of Cape. Since that date, Charter has held no Cape shares and Charter has had no investment or other relationship with Cape. (R. C 291-300 (A006-15), ¶ 13)

4. The Separate Finances, Policies And Practices Of Charter And Cape

Because the businesses of Charter and Cape are completely different, all aspects of their operations have always been separate. The offices and facilities of Cape always have been completely separate from those of Charter, and Cape always has maintained a head office in a different location from that of Charter. Cape always has maintained separate bank accounts and kept separate books and records at separate locations from those of Charter. (R. C 291-300 (A006-15), ¶ 17) Until Charter disposed of its Cape shares in 1996, Charter was required by the law of the United Kingdom to consolidate Cape's earnings with its own for accounting purposes; nevertheless, each company had separate, independent auditors until 1993, and each company always issued its own financial statements to its shareholders. (R. C 291-300 (A006-15), ¶ 18)

The Board of Directors of Cape always has met on a regular basis. Meetings of Cape's Board always have been held at different times and at separate locations from the Boards of Charter Consolidated P.L.C. and Charter plc. (R. C 291-300 (A006-15), ¶ 16)

From 1965 to 1969, Charter nominated two non-executive directors to Cape's Board. During that time the number of directors on Cape's Board varied from eleven to fourteen. After the 1969 tender offer, Charter nominated between two and four non-executive directors to Cape's Board, which has consisted of seven to thirteen directors for most of the years since 1969. (R. C 291-300 (A006-15), ¶ 14) At all times, Charter's nominees comprised a minority of Cape's Board.

None of Charter's nominees, and no Charter personnel, have ever served as an officer of Cape or assumed managerial responsibilities for Cape's operations. When Charter sold its Cape shares in July 1996, all three Charter nominees on Cape's Board resigned and Charter has had no representation on Cape's Board since that time. (*Id.*)

After the 1969 tender offer, Charter invited the then Managing Director and Chairman of Cape to join Charter Consolidated P.L.C.'s Board, and he did so. He left Charter Consolidated P.L.C.'s Board in 1979; since 1980, no member of Cape's management has been on any Charter Board. The number of directors on the Board of Charter Consolidated P.L.C. has varied from ten to twenty until 1993, when Charter reorganized, and Charter plc presently has eight directors (Charter Consolidated P.L.C. has four directors). (R. C 291-300 (A006-15), ¶ 15) Meetings of Charter's and Cape's shareholders are now and always have been held separately from one another. (R. C 291-300 (A006-15), ¶ 16)

Cape always has been separately capitalized and always has paid its own operating expenses. Cape has never borrowed funds from Charter, and Charter has never guaranteed a loan to Cape. (R. C 291-300 (A006-15), ¶ 19)

Cape's management is completely independent of that of Charter. Charter has never participated in the management or day-to-day business decisions or operations of Cape. Nor has Charter ever participated in any decisions by Cape or Cape's subsidiaries regarding any aspect of the asbestos business. (R. C 291-300 (A006-15), ¶¶ 20-22) Charter has never employed the name or trademarks of Cape, and Cape has never made use of the name or trademarks of Charter. (R. C 291-300 (A006-15), ¶ 20)

ARGUMENT

Charter has never engaged in any aspect of the asbestos business, nor has Charter ever conducted business of any kind in the United States. Nevertheless, Charter has been named in asbestos-related lawsuits as a result of its formerly owning shares in another company, Cape, which at one time had subsidiaries that mined asbestos. In Illinois, counsel for plaintiff in this case has filed at least 15 such cases against Charter over the last 15 years. In each and every one of those cases the Illinois courts – including this Court – ruled that personal jurisdiction was lacking as to Charter. The result in this case should be the same.

First, plaintiff's allegation that Charter and other named defendants, including Cape, participated in a conspiracy to withhold information regarding the health hazard and dangers posed by asbestos (R. C 3-8 (A016-21), ¶¶ 14-15) is insufficient to establish personal jurisdiction over Charter. The Illinois Supreme Court has never recognized the conspiracy theory as a valid basis for personal jurisdiction. The use of such a theory under the facts of this case would violate due process because it would subject Charter to the court's jurisdiction based upon the conduct of others in which Charter did not participate. To the extent that some non-Illinois courts have suggested that jurisdiction may, under certain very limited circumstances, be based on a defendant's participation in a conspiracy, the plaintiffs have been required to allege specific jurisdictional facts which are entirely absent from the record in this case.

Second, Charter has not had any contacts with Illinois that would subject it to the court's jurisdiction pursuant to the terms of the Illinois long-arm and personal service statutes and the requirements of due process. Nor may jurisdiction be asserted against Charter based on the alleged in-state activities of Cape by virtue of Charter's previous ownership of Cape shares. As this Court and every other Illinois court to address the issue has held, Charter is not the "alter-ego" of Cape and, therefore, the conduct of Cape is not attributable to Charter for jurisdictional purposes.

A. Standard of Review on Appeal

In support of its motion to dismiss, Charter established through the Thwaite Affidavit and Mr. Thwaite's deposition testimony that Charter has no jurisdictional contacts with Illinois. Charter further established that Cape has always been an entirely independent company, and that Cape is not an "alter-ego," agent or co-conspirator of Charter. Plaintiff never attempted to dispute these facts, choosing instead to argue that the allegation of conspiracy in the Complaint is sufficient to satisfy her burden of proving sufficient contacts. (R. C 890-925). The lower court, without any specific findings, denied Charter's motion. Because the issue of whether a trial court has personal jurisdiction over a party is a question of law, this Court should apply a *de novo* standard of review. *See, e.g., White v. Ratcliffe*, 285 Ill. App. 3d 758, 764, 674 N.E.2d 906, 911 (2d. Dist. 1996).

B. Applicable Standards for Exercise of *In Personam* Jurisdiction

It is well-settled that an Illinois court may exercise *in personam* jurisdiction over a foreign defendant based on its contacts (if any) with the state only if plaintiff proves (i) that the defendant has had jurisdiction-conferring contacts with this forum within the meaning of the Illinois long-arm statute, § 2-209 of the Illinois Code of Civil Procedure,[3] or (ii) that the defendant "has submitted to the jurisdiction of the Courts" of Illinois and is therefore subject to service of process pursuant to this State's personal service statute, § 2-208 of the Illinois Code of Civil Procedure.[4] Plaintiff has the burden of establishing jurisdiction over Charter. *R.W. Sawant & Co. v. Allied Programs Corp.*, 111 Ill. 2d 304, 310, 489 N.E.2d 1360, 1363 (1986). Where personal jurisdiction over a non-resident is contested, the plaintiff must establish jurisdiction by a preponderance of the evidence. *Campbell v. Mills*, 262 Ill. App. 3d 624, 626-27, 634 N.E.2d 41, 43-44 (5th Dist. 1994); *Johnson v. Ortiz*, 244 Ill. App. 3d 384, 388, 614 N.E.2d 408, 411 (1st Dist. 1993); *People ex rel. Hartigan v. Kennedy*, 215 Ill. App. 3d 880, 890, 576 N.E.2d 107, 113-114 (1st Dist. 1991); *Finnegan v. Les Pourvoires Fortier, Inc.*, 205 Ill. App. 3d 17, 24-25, 562 N.E.2d 989, 993-94 (1st Dist.

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[3] The Illinois long-arm statute provides, in pertinent part, as follows:

> § 2-209. Act submitting to jurisdiction – Process.
>
> (a) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, his or her personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of such acts:
>
> (1) The transaction of any business within this State;
>
> (2) The commission of a tortious act within this State;
>
> (3) The ownership, use, or possession of any real estate situated in this State;
>
> * * *

> (c) A court may also exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States.

735 ILCS 5/2-209.

[4] Section 2-208 (the Illinois Personal Service Statute) provides in relevant part:

> § 2-208. Personal service outside State.
>
> (a) Personal service of summons may be made upon any party outside the State. If upon a citizen or resident of this State or upon a person who has *submitted to the jurisdiction of the courts of this State*, it shall have the force and effect of personal service of summons within this State; otherwise it shall have the force and effect of service by publication.

735 ILCS 5/2-208 (emphasis added). This section has been interpreted by Illinois courts to confer personal jurisdiction over a defendant who has conducted business activities within the State unrelated to the cause of action only if such activities are "continuous and substantial." *Huffman v. Inland Oil & Transp. Co.*, 98 Ill. App. 3d 1010, 1016, 424 N.E.2d 1209, 1214 (5th Dist. 1981). Under this analysis, also referred to as the "doing business" doctrine, a nonresident defendant is subject to jurisdiction in Illinois if the unrelated activities within the state occur "not occasionally or casually, but with a fair measure of permanence and continuity." *R.W. Sawant*, 111 Ill. 2d at 313, 489 N.E.2d at 1365.

1990).[5] As demonstrated in the next section of this Argument, this burden cannot be carried by baldly alleging a conspiracy involving Charter. Further, when such allegations (even if they were sufficient to establish jurisdiction, which they are not) are refuted by facts contained in an uncontested affidavit (as they are here), such allegations are not sufficient to establish jurisdiction under any standard. *See Johnson*, 244 Ill. App. 3d at 388, 614 N.E.2d at 411.

The exercise of personal jurisdiction under either of the Illinois statutes must also be consistent with the requirements of due process under both the Constitution of the United States and the Illinois Constitution. In order to satisfy the federal due process standard, plaintiff must show that Charter has "certain minimum contacts" with the forum state such that "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Moreover, unless plaintiff proves that Charter's "conduct and connection with [Illinois] are such that [Charter] should reasonably anticipate being haled into court [here]," then jurisdiction cannot constitutionally be exercised under the long-arm statute. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *see also Asahi Metal Indus. Co. v. Superior Ct. Of*

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[5] While some support does exist in Illinois for applying a *prima facie* standard (*e.g.*, *Excel Energy Co. Inc., v. Pittman*, 239 Ill. App. 3d 160, 606 N.E.2d 637 (4th Dist. 1992)), the argument for requiring proof by the preponderance of the evidence is well-grounded and persuasive. *See Finnegan*, 205 Ill. App. 3d at 24-25, 562 N.E.2d at 993-94, where the court noted that in Illinois, the special and limited appearance is a defendant's *sole opportunity* to defeat the jurisdiction of the court, and thus a preponderance of the evidence standard is more appropriate. *See also Unis Int'l Corp. v. Hansen Cartridge Co.*, No. 93 C 0765, 1994 WL 110175, fn. 7 (N.D. Ill. March 29, 1994) (acknowledging *Finnegan*, which indicated that because of the difference in procedure between Illinois and federal court, the *prima facie* standard is still appropriate in *federal* court). Thus, preponderance of the evidence is the correct standard to apply to a jurisdictional challenge pursuant to a special and limited appearance.

California, Solano County, 480 U.S. 102, 109 (1987); *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). When, as in the present case, the defendant is located outside the United States, due process concerns are heightened and "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Asahi*, 480 U.S. at 115.

In addition to the federal minimum due process requirements, Illinois courts require that the exercise of jurisdiction over a non-resident defendant comport with "the Illinois Constitution, which contains its own separate and independent guarantee of due process." *Mors v. Williams*, 791 F. Supp. 739, 741 (N.D. Ill. 1992); *see also Rollins v. Ellwood*, 141 Ill. 2d 244, 275, 565 N.E.2d 1302, 1316 (1990) (the Illinois Constitution's guarantee of due process "stands separate and independent from the Federal guarantee of due process"). An Illinois court may not exercise *in personam* jurisdiction over Charter pursuant to the long-arm statute unless: (1) the nonresident had "minimum contacts" with the forum state such that he had "fair warning" that he may be required to defend himself there; (2) the action arose out of or relates to defendant's contacts with the forum; and (3) it is reasonable to require the defendant to litigate in the forum state. *Ores v. Kennedy*, 218 Ill. App. 3d 866, 872, 578 N.E.2d 1139, 1144 (1st Dist. 1991); *Johnson*, 244 Ill. App. 3d at 388, 614 N.E.2d at 411. Moreover, under the Illinois Constitution, "jurisdiction is to be asserted 'only when it is fair, just, and reasonable to require a nonresident defendant to defend an action in Illinois, considering the quality and nature of the defendant's acts which occur in Illinois or which affect interests located in Illinois.' " *Mors*, 791 F. Supp. at 743 (quoting *Rollins*, 141 Ill. 2d at 275, 565 N.E.2d at 1316); Ill. Const. of 1970, art. 1, § 2.

As explained below, plaintiff can assert no theory of jurisdiction which is sufficient under either Illinois jurisdictional statute, and which does not offend due process under the United States and Illinois Constitutions.

C. The Lower Court Erred In Ruling That *In Personam* Jurisdiction Over Charter Can Be Based Upon The Activities Of Alleged Co-Conspirators

The issue of Charter's contacts with various states in the United States has been litigated often before. As explained fully below, every court that has considered the issue of Charter's "minimum contacts" with Illinois (*including* this Court and the trial court below, in previous rulings) has ruled that Charter itself has had *no* contacts with Illinois, and that Charter is not the "alter-ego" of Cape. *See, e.g., Mohn v. International Vermiculite Co.*, No. 85-L-16 (7th Cir. Macoupin County, Ill. Oct. 25, 1985), *aff'd*, 147 Ill. App. 3d 717, 498 N.E.2d 375 (4th Dist. 1986), *appeal denied*, 113 Ill. 2d 577, 505 N.E.2d 355 (1987); *see also infra*, at 25-27. In this case, then, plaintiff had no choice but to contrive some new legal theory in an attempt to extend the reach of the Illinois courts to Charter. Plaintiff alleged that Charter participated in a "conspiracy" with companies in the asbestos business, which allegedly agreed to hide the dangers of asbestos from their employees. However, plaintiff alleged no facts in support of the conclusory allegations in the Complaint, and offered none in response to Charter's motion to dismiss, even though Charter submitted the affidavit of Peter M. Thwaite directly refuting any possible facts upon which a "conspiracy" theory of jurisdiction could be based.

In the absence of any facts contradicting Charter's showing on its motion to dismiss, the lower court's finding of jurisdiction can only be based on the bare allegations of conspiracy in the Complaint. These allegations are an insufficient basis for the exercise of personal jurisdiction over Charter because: (1) the Illinois Supreme Court has never upheld jurisdiction under a conspiracy theory, which, if it is viable at all, is disfavored in Illinois; (2) on their face, the allegations in the Complaint do not properly allege that Charter engaged in a conspiracy, particularly in that plaintiff has made no showing that the other alleged co-conspirators were Charter's "agents" (a prerequisite to jurisdiction over Charter under a conspiracy theory); and (3) the assertion of personal jurisdiction over Charter through bare allegations of a conspiracy would violate due process.

1. The Illinois Supreme Court Has Never Accepted The Conspiracy Theory of Personal Jurisdiction

The Illinois Supreme Court has on only one occasion addressed the question of whether personal jurisdiction may be asserted based upon a defendant's alleged participation in a conspiracy. In *Green v. Advance Ross Electronics Corp.*, 86 Ill. 2d 431, 427 N.E. 2d 1203 (1981), the Supreme Court *rejected* the conspiracy theory as a basis for personal jurisdiction in that case. The Supreme Court specifically noted that the conspiracy theory has been questioned as a valid basis for imposing jurisdiction. *Green*, 86 Ill. 2d at 440-41, 427 N.E.2d at 1208. The Supreme Court cited *Chromium Industries, Inc. v. Mirror Polishing & Plating Co.*, 448 F. Supp. 544, 552 (N.D. Ill. 1978), an antitrust case, in which the United States District Court for the Northern District of Illinois stated:

> Conspiratorial activities having tortious consequences in this district, at least in the amount shown here, are not a sufficient basis for jurisdiction in the absence of any other contacts. If jurisdiction could be established by merely alleging that a corporate defendant participated in a conspiracy and that one member of the conspiracy committed a tort in the district, antitrust plaintiffs would be able to reach absent co-conspirators with no independent contacts with the forum. We see no basis for engrafting a broad conspiratorial accretion on the scope of the long-arm statutes.

Chromium Industries, Inc., 448 F. Supp. at 552 (citation omitted).

In *dicta*, the *Green* court outlined the very limited factual circumstances in which a conspiracy allegation might support jurisdiction, if that theory were ever recognized in Illinois. The Supreme Court explained that "[t]he theory of jurisdiction based on the acts of a co-conspirator must be that co-conspirators are each others' agents; thus the argument would be that when a conspirator commits a tortious act within Illinois he does so as agent for his co-conspirators, who thereby also become subject to this State's jurisdiction." *Green*, 86 Ill. 2d at 440-41, 427 N.E.2d at 1208. Thus, to the extent such a theory is viable under Illinois law,[6] a plaintiff must demonstrate (by a preponderance of the evidence) the existence of a conspiracy; the commission of a tortious act within the state; and that the act was performed by one of the co-conspirators as agent for another. *Green*, 86 Ill. 2d at 440-41, 427 N.E.2d at 1208. As explained below, plaintiff has failed to plead sufficiently these requirements, and has thus failed to meet even a *prima facie* standard (much less proof by preponderance of the evidence).

2. Plaintiff Fails To Allege A Conspiracy Involving Charter

a. Lack of Particularity

That a conspiracy must be pleaded with particularity in order to establish jurisdiction is consistent with the general rule that "[t]he factual basis for assertion and existence of jurisdiction over the person of a nonresident defendant depends upon the allegations of facts in the complaint before th[is] court." *First Nat'l Bank of Chicago v. Screen Gems, Inc.*, 40 Ill. App. 3d 427, 433, 352 N.E.2d 285, 290 (1st Dist. 1976). Failure to include allegations of a nonresident corporation's acts upon which an Illinois court can base jurisdiction is fatal to a complaint. *Reeves v. Baltimore & Ohio R.R. Co.*, 171 Ill. App. 3d 1021, 526 N.E.2d 404 (1st Dist. 1988); *see also Heller Financial, Inc. v. Conagra, Inc.*, 166 Ill. App. 3d 1, 520 N.E.2d 922 (1st Dist. 1988).

Plaintiff's Complaint fails to allege detailed facts which show the existence of a conspiracy. Just as bare conspiracy allegations are insufficient to plead conspiracy as a matter of substantive liability, *Hume & Liechty Veterinary Assocs. v. Hodes*, 259 Ill. App. 3d 367, 369, 632 N.E.2d 46, 48 (1st Dist. 1994), *Dymek v. Nyquist*, 128 Ill. App. 3d 859, 469 N.E.2d 659, 83 (1st Dist. 1984), they are insufficient for jurisdictional purposes as well:

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[6] Of course, Charter agrees with the *Chromium Industries* court that the conspiracy theory of personal jurisdiction is invalid under any circumstances.

> The cases are unanimous that a bare allegation of conspiracy between the defendant and a person within the personal jurisdiction of the court is not enough. Otherwise plaintiffs could drag defendants to remote forums for protracted proceedings even though there were grave reasons for questioning whether the defendant was [actually] suable in those forums.

Ahmed v. Quinn, No. 95 C 6673, 1996 WL 388418, at *4 (N.D. Ill. July 9, 1996) (quoting *Stauffacher v. Bennett*, 969 F.2d 455, 460 (7th Cir. 1992) (applying the Wisconsin long-arm statute), *cert. denied*, 506 U.S. 1034 (1992)). Rather, a plaintiff is required to plead the "ultimate facts" linking a defendant with the purported conspiracy. *Dymek*, 128 Ill. App. 3d at 866, 469 N.E.2d at 666. Specifically, the plaintiff must allege facts demonstrating that the defendant "understands the general objectives of the conspiratorial scheme, accepts them, and agrees, either explicitly or implicitly to do its part to further these objectives." *Adcock v. Brakegate, Ltd.*, 164 Ill. 2d 54, 64, 645 N.E.2d 888, 894 (1995).

Herein, the conspiracy allegations against Charter are insufficient on their face. First, the Complaint omits Charter from the list of "Co-Conspirators" contained in paragraph 2 of the Complaint. Instead, Charter is defined as a "Defendant" and not as a "Co-Conspirator." Second, insofar as the Complaint states that the Co-Conspirators conspired with each other and with the other Defendants, the Complaint fails to specify which of the Defendants was a member of the conspiracy or, more importantly, how any of the Defendants participated in the conspiracy. (Complaint, ¶¶ 8-15 (A017-20) (R. C 4-7)) Indeed, the Complaint does not even purport to make particularized allegations, stating instead that "[o]ne or more" unspecified Co-Conspirators or Defendants committed various overt acts. Charter is not identified as committing *any* act in connection with the conspiracy, nor are any facts alleged concerning Charter's knowledge of or participation in the conspiracy. *Id.* Thus, the Complaint fails to allege that Charter "underst[ood] the general objectives of the conspiratorial scheme, accept[ed] them, and agree[d], either explicitly or implicitly to do its part to further these objectives." *Adcock*, 164 Ill. 2d at 64, 645 N.E.2d at 894. Because the Complaint's allegations fail, on their face, to establish Charter's participation in a conspiracy, they cannot possibly provide a basis for jurisdiction as to Charter.

b. Failure to Challenge the Thwaite Affidavit

Moreover, plaintiff's failure to refute Mr. Thwaite's statements in his sworn affidavit – that Charter never engaged in either any aspect of the asbestos business or any conspiracy with any of the defendants – precludes plaintiff from establishing jurisdiction based on a conspiracy theory. Mr. Thwaite's affidavit explained in great detail the nature of Charter's business and its arms' length relationship with Cape. (R. C 291-300 (A006-15), ¶¶ 4-23) The affidavit concluded:

> Charter, either by itself or through its agents, employees, or representatives, has never mined, processed, sold or distributed raw asbestos or asbestos-containing products, nor has Charter, either by itself or through its agents, employees, or representatives, conspired with any party to distribute asbestos or asbestos-containing products.

(Thwaite Aff., ¶ 4, (A007-8) (R. C 292-93)) Plaintiff failed to submit an affidavit controverting these sworn statements or the detailed factual statements upon which they are based.

It is well-settled in Illinois that, "[i]f a defendant's affidavit contesting jurisdiction is not refuted by a counter-affidavit filed by the plaintiff . . . [then] the facts alleged in the defendant's affidavit are accepted as true." *Kutner v. DeMassa*, 96 Ill. App. 3d 243, 248, 421 N.E.2d 231, 235 (1st Dist. 1981). In *Kutner*, plaintiff merely alleged, in conclusory fashion, that certain co-conspirators, acting as defendant's agents, perpetrated a tort in Illinois. *Kutner*, 96 Ill. App. 3d at 243-45, 248, 421 N.E.2d at 232-33, 235. Plaintiff failed to plead any facts which demonstrated that an agency relationship existed between the alleged co-conspirators and the defendant, or that the defendant "agreed, schemed, or conspired" to injure the plaintiff. By contrast, the defendant submitted an affidavit in direct contradiction of the plaintiff's conspiracy allegations. Accordingly, based upon the plaintiff's vague assertion of conspiracy and his failure to refute the defendant's affidavit, the court denied jurisdiction over the defendant. *Kutner*, 96 Ill. App. 3d at 249, 421 N.E.2d at 236; *see also Alpert v. Bertsch*, 235 Ill. App. 3d. 452, 463, 601 N.E.2d 1031, 1038 (1st Dist. 1992).

As noted above, plaintiff's motion to strike Thwaite's affidavit was denied. (A005) (R. C 926) Plaintiff never filed a counter-affidavit, nor made any other attempt to refute the factual assertions contained in the affidavit. Thus, Mr. Thwaite's uncontroverted affidavit – specifically stating that Charter neither participated in the asbestos business nor in a conspiracy with the defendants – bars plaintiff from establishing the ultimate facts required for the assertion of jurisdiction over Charter based on a theory of conspiracy.

c. No Showing of Agency

Even if plaintiff could properly allege a conspiracy involving Charter, jurisdiction could not be asserted unless the plaintiff could establish that one of the co-conspirators committed acts in Illinois as Charter's *agent*. As the Illinois Supreme Court stated in *Green*,

> It is not true that if one conspirator is subject to Illinois jurisdiction so are all the others. Rather, the theory of jurisdiction based on the acts of a co-conspirator must be that co-conspirators are each others' agents; thus the argument would be that when a conspirator commits a tortious act within Illinois he does so as agent for his co-conspirators . . .

Green, 86 Ill. 2d at 440-41, 427 N.E.2d at 1208.

The mere existence of a parent-subsidiary relationship, as formerly existed (but no longer exists) between Charter and Cape, is insufficient by itself to create an agency relationship that would support the exercise of jurisdiction. *Wissmiller v. Lincoln Trail Motosports*, 195 Ill. App. 3d 399, 403, 552 N.E.2d 295, 298 (4th Dist. 1990); *In re Schwinn Bicycle Co.*, 192 B.R. 461, 476 (Bankr. N.D. Ill. 1996) ("Even existence of a parent-subsidiary relationship is not sufficient to make the subsidiary the parent's agent for jurisdictional purposes"). Rather, to demonstrate agency, a plaintiff must allege sufficient indicia of an agency relationship, *i.e.*, whether intent existed to create an agency relationship; whether the agent acted for the benefit of the principal; and, finally, whether the agent was under the control of the principal. *See generally* HAROLD GILL REUSCHLEIN & WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP §§ 3-5, at 11-13 (2d ed. 1990).

Here, plaintiff has failed to allege either an intent to create an agency relationship, or control of an alleged "agent" by Charter. For example, plaintiff has failed to allege that any of the named defendants or co-conspirators acted under authority from Charter. Plaintiff here has failed to plead that *any* of the named defendants or co-defendants were acting under Charter's authority, or for Charter's benefit. On the other hand, Charter's Peter Thwaite provided a lengthy and detailed affidavit describing Charter's relationship with Cape and negating any possible conspiracy or agency relationship between them or any other defendant. Mr. Thwaite concluded as follows:

> 24. As set forth above, Charter has never engaged in any aspect of the asbestos business, nor has Charter participated in the asbestos business that at one time was carried on by Cape. Accordingly, plaintiff's allegation that Charter somehow was part of a conspiracy to distribute asbestos and to suppress medical research regarding asbestos is incorrect and without any basis in fact. Charter never conspired with Cape or anyone else, nor has Cape or any of the other defendants named in the complaint ever acted as an agent of Charter.

(R. C 291-300 (A006-15), ¶ 24) In response, plaintiff did not even attempt to state facts that might have suggested that Mr. Thwaite's statements are incorrect or even suspect.

Plaintiff thus has failed to demonstrate any agreement or scheme between Charter and the other defendants. Instead, as it stands, the plain language of the Complaint, which is devoid of any substantive facts and which does not include Charter in the group of "co-conspirators," leads to the inevitable conclusion that plaintiff has not even alleged that Charter participated in a conspiracy. Therefore, plaintiff cannot purport to invoke this Court's long-arm jurisdiction based on conspiracy theory.

3. The Exercise Of Jurisdiction Over Charter Based Upon Plaintiff's Bare Allegations Of Conspiracy Would Be Inconsistent With Due Process

Finally, the exercise of jurisdiction over Charter based upon acts in Illinois of other defendants would violate due process. It is well-settled that as a matter of due process, jurisdictional contacts must be measured with respect to each particular defendant, and may not be assessed based on another defendant's activities. *E.g.*, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n. 13 (1984) ("Each defendant's contacts with the forum State must be assessed individually"); *Rush v. Savchuk*, 444 U.S. 320, 332 (1980) ("The requirements of *International Shoe* . . . must be met as to each defendant over whom a state court exercises jurisdiction"); *Johnston v. Pneumo Corp.*, 652 F. Supp. 1402, 1406 (S.D. Miss. 1987) ("The law is established that each defendant's contacts with the forum state must be assessed on an *individual basis*") (emphasis original); *Siskind v. Villa Found. For Educ., Inc.*, 642 S.W. 2d 434, 437-38 (Tex. 1982) ("it is the contacts of the defendant himself that are determinative"); *Rambo v. American S. Ins. Co.*, 839 F.2d 1415, 1417 n.3 (10th Cir. 1988) ("due process requirements for personal jurisdiction must be met as to each individual [d]efendant") (citation omitted); *Falik v. Smith*, 884 F. Supp. 862, 866 (S.D.N.Y. 1995) (" '[j]urisidiction depends only upon each defendant's relationship with the forum . . . Regardless of their joint liability, jurisdiction over each defendant must be established individually' ").

Because Charter has had no contacts with Illinois, it would be fundamentally unfair to hale Charter into an Illinois court based on the conduct of another party. *See Buxton v. Wyland Galleries Hawaii*, 275 Ill. App. 3d 980, 982-83, 657 N.E.2d 708, 710 (4th Dist. 1995), *appeal denied*, 165 Ill. 2d 548, 662 N.E.2d 422 (1996). Moreover, the conspiracy theory of jurisdiction has been criticized for merging "the jurisdictional issue with the merits." *Stauffacher*, 969 F.2d at 459. This is because the question of personal jurisdiction is distinct from the question of substantive liability. *Bell v. Hood*, 327 U.S. 678, 682 (1946); *Stauffacher*, 969 F.2d at 460. It would be a violation of due process and fundamentally unfair for Charter to be forced to submit to the jurisdiction of the Illinois courts solely on the basis of plaintiff's conclusory conspiracy allegations.

D. Charter Is Not Subject to *In Personam* Jurisdiction Under Any Theory

Once the inadequacy of a conspiracy theory of jurisdiction is recognized, it remains only to examine the undisputed facts that Charter presented below to confirm that Charter simply cannot be subject to personal jurisdiction under any theory. The facts show emphatically that Charter did not have sufficient contacts with Illinois on which the lower court could base jurisdiction. Further, every court that has considered the issue (including this Court and the court below) has ruled not only that Charter itself has no contacts with Illinois, but that Cape is not the "alter-ego" of Charter.

For example, in *Mohn*, this Court held that:

> Neither Charter nor its wholly-owned subsidiary directly engaged in mining, production, marketing, or shipping of asbestos or asbestos products. Charter is not qualified to do business in Illinois. It does not: sell products, purchase goods or services, lease or own property, maintain a post office box, or have

> directors, officers or employees in Illinois. It does not: pay taxes or franchise fees, have an Illinois bank account, or advertise in the State. It has never brought suit in Illinois.

Mohn, 147 Ill. App. 3d at 718, 498 N.E.2d at 376 (copy included in the previously filed Separate Appendix to Charter's Petition for Leave to Appeal, at A002-5). The Court further determined that Charter was not the *alter ego* of Cape because:

> The companies maintain separate locations, bank accounts, and records. Under English law, their incomes are consolidated for statutory accounting purposes. Francis Howard, one of Charter's executive directors and a member of Cape's board of directors, stated that Charter is not involved in Cape's day-to-day operations nor with the day-to-day operation of Cape's subsidiaries.

Mohn, 147 Ill. App. 3d at 718, 498 N.E.2d at 376.

This Court's ruling in *Mohn* is consistent with every other Illinois court to address the issue of personal jurisdiction over Charter. In 1985, the Circuit Court of the Eleventh Judicial Circuit granted Charter's motions to dismiss the complaint in three asbestos-related actions, finding that jurisdiction did not exist over Charter based upon Cape's alleged activities within the forum. *Wehmeier v. UNR Indus.*, No. 82-L-80 (11th Cir. McLean County, Ill., Nov. 27, 1985); *Gowen v. Unarco Indus.*, No. 83-L-140 (11th Cir. McLean County, Ill., Nov. 27, 1985); *Lafever v. Unarco Indus.*, No. 84-L-224 (11th Cir. McLean County, Ill., Nov. 27, 1985) (copies included in the previously filed Separate Appendix at A006-7).

Similarly, on December 1, 1988, the Circuit Court of the Eleventh Judicial District granted Charter's motions to dismiss ten separate actions commenced between 1983 and 1988. In each of those decisions the court, relying upon *Mohn* and other authorities, held (1) "[t]hat there [had] been no showing that the Charter defendants [had] engaged in any activity at any time in Illinois . . . which would subject them to the *in personam* jurisdiction of the Illinois courts;" and (2) that the

Charter defendants were not subject to jurisdiction as the *alter ego* of Cape or any of Cape's subsidiaries. *Robbins v. Brakegate, Ltd.*, No. 83-L-300 (11th Cir. McLean County, Ill., Dec. 1, 1988); *Denham v. Unarco Indus.*, No. 85-L-360 (11th Cir. McLean County, Ill., Dec. 1, 1988); *Kessinger v. Unarco Indus.*, No. 85-L-359 (11th Cir. McLean County, Ill., Dec. 1, 1988); *Hammond v. Unarco Indus.*, No. 86-L-128 (11th Cir. McLean County, Ill., Dec. 1, 1988); *Wolford v. Unarco Indus.*, No. 87-L-104 (11th Cir. McLean County, Ill., Dec. 1, 1988); *Kessinger v. North American Asbestos Corp.*, No. 87-L-120 (11th Cir. McLean County, Ill., Dec. 1, 1988); *Swank v. Brakegate, Ltd.*, No. 87-L-292 (11th Cir. McLean County, Ill., Dec. 1, 1988); *Smith v. Brakegate, Ltd.*, No. 87-L-293 (11th Cir. McLean County, Ill., Dec. 1, 1988); *Hernandez v. Brakegate, Ltd.*, 87-L-294 (11th Cir. McLean County, Ill., Dec. 1, 1988); *Adcock v. Brakegate, Ltd.*, No. 87-L-306 (11th Cir. McLean County, Ill., Dec. 1, 1988) (copies included in the previously filed Separate Appendix at A008-187).

As recently as January, 1990, the Circuit Court for the Eleventh Judicial Circuit dismissed an asbestos-related action filed against Charter based upon lack of jurisdiction. *Johnson v. Charter Consolidated, P.L.C.*, No. 89-L-187 (11th Cir. McLean County, Ill., Jan. 31, 1990) (copies included in the previously filed Separate Appendix at A188).

This overwhelming weight of authority should, by itself, establish that Charter is not subject to personal jurisdiction in Illinois. However, even apart from these rulings, the uncontroverted evidence in this case clearly shows that *in personam* jurisdiction cannot attach to Charter under any theory.

1. Charter Is Not Subject To *In Personam* Jurisdiction Under The Illinois Long-Arm Statute Or The Illinois Personal Service Statute

The assertion of personal jurisdiction over Charter based on its own contacts with Illinois would be inconsistent with the Illinois long-arm and personal service statutes, as well as federal and state due process. This is because the unrefuted evidence illustrates that Charter simply has not had the necessary "minimum contacts" with Illinois. Plaintiff's cause of action is based upon the defendants' alleged manufacture and distribution of asbestos and asbestos-containing products. Because Charter has never engaged in any aspect of the asbestos business, either in Illinois or anywhere else (Thwaite Aff., ¶ 4 (A006-15) (R. C 291-300)), any contact Charter might have with Illinois would be unrelated to plaintiff's cause of action and therefore must satisfy the standards for general jurisdiction under Illinois's personal service statute. *R.W. Sawant*, 111 Ill. 2d at 313, 489 N.E.2d at 1365. The personal service statute is not satisfied in this case because Charter has not had "continuous and systematic" contacts "with a fair measure of permanence and continuity" with the State. *R.W. Sawant*, 111 Ill. 2d at 313, 489 N.E.2d at 1365.

Indeed, the Thwaite Affidavit confirms that Charter has not committed *any* acts in the State of Illinois. (Thwaite Aff., ¶ 6 (A006-15) (R. C 291-300)) Charter has never been registered or qualified to do business in Illinois, and it has never maintained an office in Illinois. No director, officer, or employee of Charter has ever resided or conducted business in Illinois. Charter has never owned or leased real property, maintained a post office box or telephone, or advertised in the State of Illinois. Charter has never had a registered agent for service of process here, and it has never paid taxes or franchise fees or commenced a lawsuit in Illinois. (*Id.*)

Under these circumstances, the exercise of jurisdiction over Charter would offend all notions of " 'fair play and substantial justice.' " *Buxton*, 275 Ill. App. 3d at 982-83, 657 N.E.2d at 710 (citation omitted). This is particularly true in Charter's case because Charter is the resident of a foreign country, and "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *Asahi*, 480 U.S. at 114; *see also Buxton*, 275 Ill. App. 3d at 982-83, 657 N.E.2d at 710 (noting that "inconvenience may at some point become so substantial as to achieve *constitutional* magnitude") (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 483 n.26 (1985)) (emphasis in original).

2. Charter Is Not The Alter Ego Of Cape Or Of Cape's Subsidiaries

Plaintiffs in the past have contended that Charter is subject to jurisdiction on an *alter ego* theory by virtue of Charter's previous investment relationship with Cape. However, as numerous Illinois courts have held in previous litigation involving Charter, and as shown in the Thwaite Affidavit and the discussion below, the "corporate veil" of Cape and its subsidiaries cannot be pierced to hold Charter subject to jurisdiction in Illinois. Cape and its subsidiaries are completely separate and independent entities, and the corporate integrity of each of those companies has always been respected by Charter. Thus, this theory of jurisdiction is also unavailing.

a. Illinois Courts Pierce The Corporate Veil Only Under Exceptional Circumstances

Under Illinois law, piercing the corporate veil is an extraordinary remedy to be granted only "in those exceptional circumstances where to adhere to the fiction [of separate corporate legal entities] would sanction a fraud or promote injustice." *B. Kreisman & Co. v. First Arlington Nat'l Bank of Arlington Heights*, 91 Ill. App. 3d 847, 850, 415 N.E.2d 1070, 1072 (2d Dist. 1980). In fact, under Illinois law, in order to pierce the corporate veil a plaintiff must demonstrate that: (1) there is "such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist;" and (2) adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice." *Alpert*, 235 Ill. App. 3d at 460, 601 N.E.2d at 1036; *see also Great Lakes Overseas, Inc. v. Wah Kwong Shipping Group, Ltd.*, 990 F.2d 990, 996 (7th Cir. 1993). A plaintiff seeking to pierce the corporate veil has a heavy burden, then, because "[a] corporate entity will be disregarded and the veil of limited liability pierced" only where a fraud has been perpetuated, and to do otherwise "would . . . present an obstacle to the protection of private rights or where the corporation is merely the . . . business conduit of a governing or dominating personality." *Alpert*, 235 Ill. App. 3d at 460, 601 N.E.2d at 1036. Thus, the fact that the subsidiary is wholly owned and shares officers with the parent are not alone a sufficient basis for exercising *in personam* jurisdiction over a parent where jurisdiction exists over the subsidiary. *Betar v. De Havilland Aircraft of Canada Ltd.*, 80 F.R.D. 400, 401 (N.D. Ill. 1977), *rev'd on other grounds*, 603 F.2d 30 (7th Cir. 1979), *cert. denied*, 444 U.S. 1098 (1980); *accord Graco, Inc. v. Kremlin, Inc.*, 558 F. Supp. 188, 191 n.3 (N.D. Ill. 1982) ("common directors and officers of a parent and its [wholly owned] subsidiary is not enough, by itself, to confer jurisdiction over a nonresident parent corporation"); *see also Main Bank of Chicago v. Baker*, 86 Ill. 2d 188, 204-05, 427 N.E.2d 94, 101 (1981) (neither stock ownership nor common officers and directors alone creates an *alter ego* relationship, as "[t]hese practices are common and exist in most parent-subsidiary relationships"). Instead, the nature or degree of the dominance that must be shown in order for a subsidiary to be considered the *alter ego* or a "mere department" of its parent has been characterized as actual and pervasive "control" over the subsidiary's daily operations. *See Betar*, 80 F.R.D. at 401 ("[t]he maintenance of separate records, separate offices and a *Bona fide* business purpose" control a court's determination of whether the corporate structure is a "fiction").

The principle of corporate separateness is equally applicable to the issue of *in personam* jurisdiction. The United States Supreme Court has long recognized that the activities of a subsidiary do not subject a parent corporation to *in personam* jurisdiction in the state where the subsidiary is located. *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 336 (1925).[7] Moreover, overwhelming authority in

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[7] Under the *Cannon* doctrine, the legal distinction between affiliated corporations is respected where the "corporate separation [is] real [and] not

Illinois establishes that significant stock ownership and overlapping directors are not sufficient to subject a parent corporation to jurisdiction based on the subsidiary's contacts with Illinois. *E.g., Rae Prod. and Chemicals Corp. v. Koch Materials, Co.*, No. 93 C 4818, 1995 WL 715884 (N.D. Ill. Dec. 1, 1995) (where plaintiff failed to allege sufficient factors to demonstrate total domination of the subsidiary by the parent, or that the subsidiary was an "agent" of the parent, court declined to exercise jurisdiction over parent based on acts of wholly owned subsidiary within the forum); *Sportmart, Inc. v. Frisch*, 537 F. Supp. 1254 (N.D. Ill. 1982) (where evidence showed that parent did not participate in operating decisions of subsidiary, court declined to exercise jurisdiction over parent based on acts of subsidiary within the forum); *John O. Butler Co. v. Standard Oil Co.*, 365 F. Supp. 501, 503 (N.D. Ill. 1973) (court declined to exercise jurisdiction over parent where parent and subsidiary were separately incorporated and, while directors overlapped, each board was distinct and included members not on the other's board).

Finally, under Illinois law, where a nonresident parent acquires shareholder control of an entity already engaged in an established business in the forum and remains passive with respect to the subsidiary's management, finances and operations, then the parent will not be regarded as the subsidiary's *alter ego. Connelly v. Uniroyal, Inc.*, 55 Ill. App. 3d 530, 370 N.E.2d 1189 (1st Dist. 1977) (where subsidiary had conducted the same business which had resulted in the plaintiff's injury "long before [the parent's] acquisition of its stock," and

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pure fiction." *Cannon*, 267 U.S. at 337. In *Cannon*, the Court noted that through complete ownership of the subsidiary's capital stock, the parent "exert[ed] its control both commercially and financially" and dominated the subsidiary "immediately and completely." *Cannon*, 267 U.S. at 335. The subsidiary had been established solely to market the parent's products in North Carolina, a function performed in other states by unincorporated divisions of the parent company. Despite the extensive "control" by the parent over the subsidiary, the Court declined to pierce the corporate veil based on its finding that "[t]he existence of the [subsidiary] as a distinct corporate entity [was] in all respects observed." *Cannon*, 267 U.S. at 335.

parent never participated in the manufacture of the subsidiary's products, jurisdiction did not attach even though, at the time of the commission of the tort, the parent owned 95 percent of the subsidiary's stock, two of the subsidiary's directors were directors, officers or employees of the parent, and the product carried the parent's trademark), *aff'd in part and rev'd in part*, 75 Ill. 2d 393, 389 N.E.2d 155 (1979) (affirming the finding with respect to the parent's non-liability), *cert. denied*, 444 U.S. 1060 (1980).

The court's holding in *Connelly* is particularly applicable here because Cape existed as an independent company for over 70 years before Charter was formed. Moreover, as in *Connelly*, Charter has never participated in Cape's manufacture of products. The only contacts between Charter and Cape were Charter's shareholding interest in Cape and its minority representation on Cape's Board of Directors. These contacts are insufficient to render Cape the *alter ego* of Charter, and therefore none of Cape's activities at any time can furnish a basis for this Court's exercise of *alter ego* jurisdiction over Charter.

b. Charter Is Not The Alter Ego Of Cape

An analysis of the relationship between Charter and Cape shows that Cape always has been operationally, financially, and commercially independent of Charter.[8] Thus:

(1) Charter and Cape are engaged in entirely different businesses, their operations are completely separate and they do business from separate offices. (Thwaite Aff., ¶ 17 (A006-15) (R. C 291-300))

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[8] Charter has had no connections of any kind with Cape's operating subsidiaries. (Thwaite Aff., ¶¶ 22-23 (A006-15) (R. C 291-300)). Accordingly, in order to prove that Charter is subject to jurisdiction in Illinois, plaintiffs must show (1) that Cape is the *alter ego* of one or more of its former asbestos subsidiaries and that one or more of those subsidiaries is subject to jurisdiction in Illinois, and (2) that Cape is the *alter ego* of Charter.

(2) All corporate formalities have been observed. (*Id.*, ¶¶ 16-20 (A006-15) (R. C 291-300))

(3) Cape was not incorporated by Charter, and is adequately and independently capitalized. (*Id.*, ¶¶ 10, 11, 19 (A006-15) (R. C 291-300))

(4) Charter and Cape never had officers or directors in common other than Charter's minority, non-executive representation on Cape's Board (which ceased as of July 18, 1996), and Cape's Board and management are independent of Charter. (*Id.*, ¶¶ 14-16 (A006-15) (R. C 291-300)).

(5) Charter has never sought a common corporate identification with Cape. (*Id.*, ¶ 20 (A006-15) (R. C 291-300))

(6) Cape and its subsidiaries have never been treated as divisions or "departments" of Charter. (*Id.*, ¶¶ 16-20 (A006-15) (R. C 291-300))

(7) Charter has never been involved in the day-to-day management or the business affairs of Cape, and Charter does not pay Cape's operating expenses. (*Id.*, ¶¶ 19-20 (A006-15) (R. C 291-300))

(8) Charter has not shared financial or accounting facilities with Cape. (*Id.*, ¶¶ 18-19 (A006-15) (R. C 291-300))

(9) As of July 18, 1996, Charter sold all of its Cape shares, and Charter currently has no investment or other relationship with Cape. (*Id.*, ¶ 13 (A006-15) (R. C 291-300))

See Graco, 558 F. Supp. at 191 (citing *alter ego* factors). On the basis of these facts, plaintiff cannot sustain her burden of establishing that Cape is a "mere department" of Charter or that Charter exercises actual and pervasive control over Cape's day-to-day operations. *Betar*, 80 F.R.D. at 401. Moreover, there is absolutely no evidence in this case that Charter abused the corporate form to perpetrate a fraud or injustice, as is required by Illinois law. *Alpert*, 235 Ill. App. 3d at 460, 601 N.E.2d at 1036.

Accordingly, there is nothing in the relationship between Charter and Cape that would justify piercing the corporate veil to exercise jurisdiction over Charter. Cape and its subsidiaries have always been financed, managed, and operated independently of Charter. Neither Cape nor any of its subsidiaries has ever been so dominated by Charter that it has been a "mere department" of Charter, with no separate mind, will, or existence of its own. Indeed, the only relationship that has ever existed between Charter and Cape is that of an investor to an investment. Without more, that relationship is insufficient to support a finding that Cape is the *alter ego* of Charter. Thus, Charter cannot be subjected to *in personam* jurisdiction in Illinois based on the acts of Cape or Cape's subsidiaries.

CONCLUSION

The lower court erred in ruling that plaintiff's conclusory conspiracy allegations are by themselves sufficient to support jurisdiction over Charter in Illinois. Charter came forward with persuasive evidence that it did not have sufficient contacts with Illinois, and plaintiff, which bears the burden to show a sufficient basis for jurisdiction, did nothing more than refer to the allegations of conspiracy. The lower court, contrary to the uncontroverted facts, the overwhelming weight of authority, and even the most elemental notions of fairness, found that the Complaint is enough. It is not, and this Court should therefore reverse the lower court's ruling and instruct the lower court to enter an order dismissing Charter from the case for lack of personal jurisdiction.

Respectfully submitted,

Charter plc

By: /s/ John Frey
One of its attorneys

John E. Frey, Esq.
David Simon, Esq.
Wildman, Harrold Allen & Dixon
225 Wacker Drive
Chicago, Illinois 60606-1229
(312) 201-2000

Of Counsel:
Werner Polak, Esq.
Stephen Fishbein, Esq.
Shearman & Sterling
Citicorp Center
153 East 53rd Street
New York, New York 10022
(212) 848-4000

No. 4-97-0386

IN THE

Appellate Court of Illinois Fourth District

ELEANOR PRICE,
Individually and as Special
Administrator of the Estate
of Floud Price, deceased,
Plaintiff-Appellee,
v.
UNARCO INDUSTRIES,
INC., et al.,
Defendants,
and
CHARTER PLC,
Defendant-Appellant.

Appeal from the Circuit
Court of the Eleventh
Judicial Circuit, McLean
County, Illinois

McLean County No.
95 L 50

The Honorable
Ronald C. Dozier,
Judge Presiding.

APPELLANT CHARTER PLC'S BRIEF IN SUPPORT OF ITS APPEAL FROM DENIAL OF ITS MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

WILDMAN, HARROLD, ALLEN & DIXON
JOHN E. FREY
DAVID M. SIMON
225 WEST WACKER DRIVE
SUITE 3000
CHICAGO, ILLINOIS 60606-1229
(312) 201-2000

SHEARMAN & STERLING
WERNER L. POLAK
STEPHEN FISHBEIN
153 EAST 53RD STREET
NEW YORK, NEW YORK 10022
(212) 848-4000
Attorneys for Defendant-Appellant, Charter plc

ORAL ARGUMENT REQUESTED

NATURE OF THE ACTION

This action was brought by the plaintiff to recover damages for injuries allegedly suffered as a result of exposure to asbestos and asbestos-containing materials. Defendant Charter plc ("Charter") is an investment holding company located in the United Kingdom, which has never engaged in any aspect of the asbestos business nor conducted business of any kind in the United States.

On November 14, 1996, Charter filed a special and limited appearance and a motion to dismiss plaintiff's Complaint[1] for lack of personal jurisdiction (R. C 305-455).[2] Charter's motion was supported by the affidavit of Peter M. Thwaite (the "Thwaite Affidavit") (included in the attached Appendix at A006-15). Mr. Thwaite is Charter's Company Secretary and keeper of its records. (A006-15) (R. C 348-357, 822) On April 28, 1997, without making any specific findings, the lower court entered an order denying Charter's motion to dismiss. (A005) (R. C 979) Pursuant to Supreme Court Rule 306(a)(3), Charter petitioned this Court for leave to appeal the denial of its motion to dismiss. Charter's petition was granted on July 8, 1997.

ISSUE PRESENTED FOR REVIEW

Did the circuit court err by denying Charter's motion to dismiss for lack of personal jurisdiction?

JURISDICTION

On April 28, 1996, the circuit court denied Charter's motion to dismiss plaintiff's Complaint, brought pursuant to its special and limited appearance, for lack of personal jurisdiction. (A005) (R. C 979) Pursuant to Illinois Supreme Court Rule 306, a party may petition the Appellate Court for leave to appeal the order of a trial court which denies a motion to dismiss contesting the *in personam* jurisdiction of the court. S. Ct. Rule 306(a)(3). On May 16, 1997, Charter petitioned this Court for leave to appeal the denial of its motion to dismiss. The petition was granted by this Court on July 8, 1997. This Court thus has jurisdiction to review the order of the court below.

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[1] A copy of the Complaint is included in the attached Appendix at A016-40.

[2] Pursuant to Illinois Supreme Court Rule 328, a Supporting Record was filed with Charter's Petition for Leave to Appeal the Denial of Its Motion to Dismiss for Lack of Personal Jurisdiction on May 16, 1997. Accordingly, all record citations within Charter's Appellate Brief will be to the Supporting Record previously submitted.

STATEMENT OF FACTS

A. Procedural History

On March 28, 1995, plaintiff caused a summons and the Complaint to be served on National Mine Service, Inc. Charter had no affiliation with National Mine Service, Inc. (R. C 38-39) Accordingly, Charter filed a special and limited appearance and a Motion to Quash Service of Process. (R. C 9-26-39)

On August 8, 1995, plaintiff caused an alias summons and the Complaint to be served on Distribution Mining, Inc., by its registered agent CT Corporation System. (R. C 124-158) Neither CT Corporation System, nor Distribution Mining, the shares of which are indirectly held by Charter, is either the registered agent of Charter or an agent of Charter authorized to accept service on behalf of Charter or otherwise. (R. C 112-113, 124-126) Accordingly, Charter filed a Motion to Quash Service of Alias Summons. (R. C 104-158)

On October 18, 1996, the Circuit Court denied Charter's motion to quash service. (R. C 997) On November 14, 1996, Charter filed a special and limited appearance and a motion to dismiss the Complaint for lack of personal jurisdiction. (R. C 305-455) Charter's motion to dismiss was supported by the Thwaite Affidavit. (A006-15) (R. C 348-357, 822) In response to notice served by plaintiff, Charter presented Mr. Thwaite for deposition on February 19, 1997. (R. C 518-938) Prior to and at the time of the deposition, Charter produced voluminous documents which plaintiff had requested. (R. C 604-607)

Prior to the hearing on Charter's motion to dismiss, plaintiff made a series of motions directed to it. First plaintiff moved to strike the motion to dismiss because, according to plaintiff, Charter had waived its right to make a motion based on lack of personal jurisdiction by first bringing, and losing, the motion to quash service. (R. C 457-458) The lower court denied this motion on April 16, 1997. (R. C 1003) On January 14, 1997, plaintiff filed a motion to strike the Thwaite Affidavit on grounds that it did not comply with the personal knowledge, specificity, and other requirements of Supreme Court Rule 191(a). That motion was denied just prior to the hearing on the motion to dismiss on April 28, 1997. (A005) (R. C 979) Also on April 28, the lower court denied plaintiff's motions to strike Charter's response to plaintiff's motion to strike the Thwaite Affidavit and Exhibit D to Charter's response (excerpts and exhibits from the deposition of Mr. Thwaite). (A005) (R. C 979)

Finally, without making any specific findings, the lower court entered an order denying Charter's motion to dismiss. (A005) (R. C 979) Pursuant to Supreme Court Rule 306(a)(3), Charter petitioned this Court for leave to appeal the denial of its motion to dismiss. Charter's petition was granted on July 8, 1997.

B. Undisputed Facts Presented to the Circuit Court

1. Charter And Its Business

Charter is an investment holding company, incorporated in 1964 under the laws of the United Kingdom as Charter Consolidated P.L.C. In 1993, Charter plc was formed and acquired all of the shares of Charter Consolidated P.L.C. Charter plc is publicly held and its shares are traded on the London Stock Exchange. Its place of business is 7 Hobart Place, London, England. Charter and its wholly-owned subsidiaries at its headquarters have 41 employees. (Thwaite Aff., ¶¶ 7-8 (A006-15) (R. C 348-357))

a. Charter Has Had No Contacts With Illinois

Charter has had no contacts with Illinois that could subject it to *in personam* jurisdiction in this State. Charter has never been registered or qualified to do business in Illinois, and it has never maintained an office in Illinois. No director, officer, or employee of Charter has ever resided or conducted business in Illinois. Charter has never owned or leased real property, maintained a post office box or telephone, or advertised in the State of Illinois. Charter has never had a registered agent for service of process here, and it has never paid taxes or franchise fees or commenced a lawsuit in Illinois. (R. C 348-357 (A006-15), ¶ 6)

b. Charter Has Never Engaged In The Asbestos Business

Charter has never engaged in any aspect of the asbestos business. It has never mined, manufactured, distributed, supplied or sold asbestos or asbestos-containing products in the United States or anywhere else. (R. C 348-357 (A006-15), ¶ 4)

2. Cape P.L.C.

Cape P.L.C. ("Cape") is a holding company which was incorporated in 1893 under the laws of the United Kingdom and which was also named as a defendant in the Complaint. (A016) (R. C 3). Cape is publicly held, and its stock is traded on the London Stock Exchange. Cape's principal place of business is Cape House, Iver Lane, Uxbridge, Middlesex, England. Cape owns shares of stock in companies engaged in, among other things, industrial contracting and the manufacturing of building products. (R. C 348-357 (A006-15), ¶ 10)

Until June 1979, Cape indirectly owned companies that mined and marketed asbestos. The assets and/or shares of those companies were sold in June 1979 to a company unaffiliated with Cape or Charter. Since that time, Cape has neither directly nor indirectly engaged in the mining or marketing of asbestos. (*Id.*)

3. Charter's Investment Relationship With Cape

Cape had been a going concern for more than 70 years before Charter acquired an interest in it. Charter first acquired an indirect interest in Cape through one of three companies that Charter acquired in 1965, The Central Mining and Investment Corporation Limited ("CMIC"). At that time, CMIC indirectly owned 16.86 percent of Cape through its subsidiary, Central Mining Finance Limited. (R. C 348-357 (A006-15), ¶ 11)

From 1965 to 1969, Charter's interest in Cape increased to 25 percent through occasional open-market purchases by its wholly owned investment subsidiaries. In May 1969, Charter made a tender offer for 50 percent of the outstanding Cape shares not already owned by Charter's subsidiaries. As a result of this tender offer, Charter's interest, through its investment subsidiaries, increased to 62.5 percent in 1969. From 1969 to 1978, through open-market purchases and as an underwriter of issues of Cape stock, Charter's interest in Cape fluctuated, gradually increasing to 67.3 percent. In 1982, Charter Consolidated Investments Ltd. ("CCI"), a wholly owned subsidiary of Charter, acquired all the Cape shares held by CMF and became the only Charter subsidiary to hold Cape shares. Thereafter, Charter's holdings, through CCI, varied slightly because of the conversion of convertible preference shares. (R. C 348-357 (A006-15), ¶ 12)

Effective as of July 18, 1996, Charter sold all of its Cape shares, which then amounted to 65.3 percent of Cape. Since that date, Charter has held no Cape shares and Charter has had no investment or other relationship with Cape. (R. C 348-357 (A006-15), ¶ 13)

4. The Separate Finances, Policies And Practices Of Charter And Cape

Because the businesses of Charter and Cape are completely different, all aspects of their operations have always been separate. The offices and facilities of Cape always have been completely separate from those of Charter, and Cape always has maintained a head office in a different location from that of Charter. Cape always has maintained separate bank accounts and kept separate books and records at separate locations from those of Charter. (R. C 348-357 (A006-15), ¶ 17) Until Charter disposed of its Cape shares in 1996, Charter was required by the law of the United Kingdom to consolidate Cape's earnings with its own for accounting purposes; nevertheless, each company had separate, independent auditors until 1993, and each company always issued its own financial statements to its shareholders. (R. C 348-357 (A006-15), ¶ 18)

The Board of Directors of Cape always has met on a regular basis. Meetings of Cape's Board always have been held at different times and at separate locations from the Boards of Charter Consolidated P.L.C. and Charter plc. (R. C 348-357 (A006-15), ¶ 16)

From 1965 to 1969, Charter nominated two non-executive directors to Cape's Board. During that time the number of directors on Cape's Board varied from eleven to fourteen. After the 1969 tender offer, Charter nominated between two and four non-executive directors to Cape's Board, which has consisted of seven to thirteen directors for most of the years since 1969. (R. C 348-357 (A006-15), ¶ 14) At all times, Charter's nominees comprised a minority of Cape's Board. None of Charter's nominees, and no Charter personnel, have ever served as an officer of Cape or assumed managerial responsibilities for Cape's operations. When Charter sold its Cape shares in July 1996, all three Charter nominees on Cape's Board resigned and Charter has had no representation on Cape's Board since that time. (*Id.*)

After the 1969 tender offer, Charter invited the then Managing Director and Chairman of Cape to join Charter Consolidated P.L.C.'s Board, and he did so. He left Charter Consolidated P.L.C.'s Board in 1979; since 1980, no member of Cape's management has been on any Charter Board. The number of directors on the Board of Charter Consolidated P.L.C. has varied from ten to twenty until 1993, when Charter reorganized, and Charter plc presently has eight directors (Charter Consolidated P.L.C. has four directors). (R. C 348-357 (A006-15), ¶ 15) Meetings of Charter's and Cape's shareholders are now and always have been held separately from one another. (R. C 348-357 (A006-15), ¶ 16)

Cape always has been separately capitalized and always has paid its own operating expenses. Cape has never borrowed funds from Charter, and Charter has never guaranteed a loan to Cape. (R. C 348-357 (A006-15), ¶ 19)

Cape's management is completely independent of that of Charter. Charter has never participated in the management or day-to-day business decisions or operations of Cape. Nor has Charter ever participated in any decisions by Cape or Cape's subsidiaries regarding any aspect of the asbestos business. (R. C 348-357 (A006-15), ¶¶ 20-22) Charter has never employed the name or trademarks of Cape, and Cape has never made use of the name or trademarks of Charter. (R. C 348-357 (A006-15), ¶ 20)

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Charter has never engaged in any aspect of the asbestos business, nor has Charter ever conducted business of any kind in the United States. Nevertheless, Charter has been named in asbestos-related lawsuits as a result of its formerly owning shares in another company, Cape, which at one time had subsidiaries that mined asbestos. In Illinois, counsel for plaintiff in this case has filed at least 15 such cases against Charter over the last 15 years. In each and every one of those cases the Illinois courts – including this Court – ruled that personal jurisdiction was lacking as to Charter. The result in this case should be the same.

First, plaintiff's allegation that Charter and other named defendants, including Cape, participated in a conspiracy to withhold information regarding the health hazard and dangers posed by asbestos (R. C 12-15 (A027-30), ¶¶ 14-15) is insufficient to establish personal jurisdiction over Charter. The Illinois Supreme Court has never recognized the conspiracy theory as a valid basis for personal jurisdiction. The use of such a theory under the facts of this case would violate due process because it would subject Charter to the court's jurisdiction based upon the conduct of others in which Charter did not participate. To the extent that some non-Illinois courts have suggested that jurisdiction may, under certain very limited circumstances, be based on a defendant's participation in a conspiracy, the plaintiffs have been required to allege specific jurisdictional facts which are entirely absent from the record in this case.

Second, Charter has not had any contacts with Illinois that would subject it to the court's jurisdiction pursuant to the terms of the Illinois long-arm and personal service statutes and the requirements of due process. Nor may jurisdiction be asserted against Charter based on the alleged in-state activities of Cape by virtue of Charter's previous ownership of Cape shares. As this Court and every other Illinois court to address the issue has held, Charter is not the "alter-ego" of Cape and, therefore, the conduct of Cape is not attributable to Charter for jurisdictional purposes.

A. Standard of Review on Appeal

In support of its motion to dismiss, Charter established through the Thwaite Affidavit and Mr. Thwaite's deposition testimony that Charter has no jurisdictional contacts with Illinois. Charter further established that Cape has always been an entirely independent company, and that Cape is not an "alter-ego," agent or co-conspirator of Charter. Plaintiff never attempted to dispute these facts, choosing instead to argue that the allegation of conspiracy in the Complaint is sufficient to satisfy her burden of proving sufficient contacts. (R. C 943-978). The lower court, without any specific findings, denied Charter's motion. Because the issue of whether a trial court has personal jurisdiction over a party is a question of law, this Court should apply a *de novo* standard of review. *See, e.g., White v. Ratcliffe*, 285 Ill. App. 3d 758, 764, 674 N.E.2d 906, 911 (2d. Dist. 1996).

B. Applicable Standards for Exercise of *In Personam* Jurisdiction

It is well-settled that an Illinois court may exercise *in personam* jurisdiction over a foreign defendant based on its contacts (if any) with the state only if plaintiff proves (i) that the defendant has had jurisdiction-conferring contacts with this forum within the meaning of the Illinois long-arm statute, § 2-209 of the Illinois Code of Civil Procedure,[3] or (ii) that the defendant "has submitted to the jurisdiction of the Courts" of Illinois and is therefore subject to service of process pursuant to this State's personal service statute, § 2-208 of the Illinois Code of Civil Procedure.[4] Plaintiff has the burden of

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[3] The Illinois long-arm statute provides, in pertinent part, as follows:

> § 2-209. Act submitting to jurisdiction – Process.
>
> (a) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, his or her personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of such acts:
>
> (1) The transaction of any business within this State;
>
> (2) The commission of a tortious act within this State;
>
> (3) The ownership, use, or possession of any real estate situated in this State;
>
> * * *
>
> (c) A court may also exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States.

735 ILCS 5/2-209.

[4] Section 2-208 (the Illinois Personal Service Statute) provides in relevant part:

> § 2-208. Personal service outside State.
>
> (a) Personal service of summons may be made upon any party outside the State. If upon a citizen or resident of this State or upon a person who has *submitted to the jurisdiction of the courts of this State*, it shall have the force and effect of personal service of summons within this State; otherwise it shall have the force and effect of service by publication.

735 ILCS 5/2-208 (emphasis added). This section has been interpreted by Illinois courts to confer personal jurisdiction over a defendant who has

establishing jurisdiction over Charter. *R.W. Sawant & Co. v. Allied Programs Corp.*, 111 Ill. 2d 304, 310, 489 N.E.2d 1360, 1363 (1986). Where personal jurisdiction over a nonresident is contested, the plaintiff must establish jurisdiction by a preponderance of the evidence. *Campbell v. Mills*, 262 Ill. App. 3d 624, 626-27, 634 N.E.2d 41, 43-44 (5th Dist. 1994); *Johnson v. Ortiz*, 244 Ill. App. 3d 384, 388, 614 N.E.2d 408, 411 (1st Dist. 1993); *People ex rel. Hartigan v. Kennedy*, 215 Ill. App. 3d 880, 890, 576 N.E.2d 107, 113-114 (1st Dist. 1991); *Finnegan v. Les Pourvoires Fortier, Inc.*, 205 Ill. App. 3d 17, 24-25, 562 N.E.2d 989, 993-94 (1st Dist. 1990).[5] As demonstrated in the next section of this Argument, this burden cannot be carried by baldly alleging a conspiracy involving Charter. Further, when such allegations (even if they were sufficient to establish jurisdiction, which they are not) are refuted by facts contained in an uncontested affidavit (as they are here), such allegations are not sufficient to

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conducted business activities within the State unrelated to the cause of action only if such activities are "continuous and substantial." *Huffman v. Inland Oil & Transp. Co.*, 98 Ill. App. 3d 1010, 1016, 424 N.E.2d 1209, 1214 (5th Dist. 1981). Under this analysis, also referred to as the "doing business" doctrine, a nonresident defendant is subject to jurisdiction in Illinois if the unrelated activities within the state occur "not occasionally or casually, but with a fair measure of permanence and continuity." *R.W. Sawant*, 111 Ill. 2d at 313, 489 N.E.2d at 1365.

[5] While some support does exist in Illinois for applying a *prima facie* standard (*e.g.*, *Excel Energy Co. Inc., v. Pittman*, 239 Ill. App. 3d 160, 606 N.E.2d 637 (4th Dist. 1992)), the argument for requiring proof by the preponderance of the evidence is well-grounded and persuasive. *See Finnegan*, 205 Ill. App. 3d at 24-25, 562 N.E.2d at 993-94, where the court noted that in Illinois, the special and limited appearance is a defendant's *sole opportunity* to defeat the jurisdiction of the court, and thus a preponderance of the evidence standard is more appropriate. *See also Unis Int'l Corp. v. Hansen Cartridge Co.*, No. 93 C 0765, 1994 WL 110175, fn. 7 (N.D. Ill. March 29, 1994) (acknowledging *Finnegan*, which indicated that because of the difference in procedure between Illinois and federal court, the *prima facie* standard is still appropriate in *federal* court). Thus, preponderance of the evidence is the correct standard to apply to a jurisdictional challenge pursuant to a special and limited appearance.

establish jurisdiction under any standard. *See Johnson*, 244 Ill. App. 3d. at 388, 614 N.E.2d at 411.

The exercise of personal jurisdiction under either of the Illinois statutes must also be consistent with the requirements of due process under both the Constitution of the United States and the Illinois Constitution. In order to satisfy the federal due process standard, plaintiff must show that Charter has "certain minimum contacts" with the forum state such that "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Moreover, unless plaintiff proves that Charter's "conduct and connection with [Illinois] are such that [Charter] should reasonably anticipate being haled into court [here]," then jurisdiction cannot constitutionally be exercised under the long-arm statute. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *see also Asahi Metal Indus. Co. v. Superior Ct. Of California, Solano County*, 480 U.S. 102, 109 (1987); *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). When, as in the present case, the defendant is located outside the United States, due process concerns are heightened and "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Asahi*, 480 U.S. at 115.

In addition to the federal minimum due process requirements, Illinois courts require that the exercise of jurisdiction over a non-resident defendant comport with "the Illinois Constitution, which contains its own separate and independent guarantee of due process." *Mors v. Williams*, 791 F. Supp. 739, 741 (N.D. Ill. 1992); *see also Rollins v. Ellwood*, 141 Ill. 2d 244, 275, 565 N.E.2d 1302, 1316 (1990) (the Illinois Constitution's guarantee of due process "stands separate and independent from the Federal guarantee of due process"). An Illinois court may not exercise *in personam* jurisdiction over Charter pursuant to the long-arm statute unless: (1) the non-resident had "minimum contacts" with the forum state such that he had "fair warning" that he may be required to defend himself there; (2) the action arose out of or relates to defendant's contacts with the forum; and (3) it is reasonable to require the defendant to litigate in the forum state. *Ores v. Kennedy*, 218 Ill. App. 3d 866, 872, 578 N.E.2d 1139, 1144 (1st Dist. 1991); *Johnson*, 244 Ill. App. 3d at 388, 614 N.E.2d at 411. Moreover, under the Illinois Constitution, "jurisdiction is to be asserted 'only when it is fair, just, and reasonable to require a nonresident defendant to defend an action in Illinois, considering the quality and nature of the defendant's acts which occur in Illinois or which affect interests located in Illinois.' " *Mors*, 791 F. Supp. at 743 (quoting *Rollins*, 141 Ill. 2d at 275, 565 N.E.2d at 1316); ILL. CONST. of 1970, art. 1, § 2.

As explained below, plaintiff can assert no theory of jurisdiction which is sufficient under either Illinois jurisdictional statute, and which does not offend due process under the United States and Illinois Constitutions.

C. The Lower Court Erred In Ruling That *In Personam* Jurisdiction Over Charter Can Be Based Upon The Activities Of Alleged Co-Conspirators

The issue of Charter's contacts with various states in the United States has been litigated often before. As explained fully below, every court that has considered the issue of Charter's "minimum contacts" with Illinois (*including* this Court and the trial court below, in previous rulings) has ruled that Charter itself has had *no* contacts with Illinois, and that Charter is not the "alter-ego" of Cape. *See, e.g., Mohn v. International Vermiculite Co.*, No. 85-L-16 (7th Cir. Macoupin County, Ill. Oct. 25, 1985), *aff'd*, 147 Ill. App. 3d 717, 498 N.E.2d 375 (4th Dist. 1986), *appeal denied*, 113 Ill. 2d 577, 505 N.E.2d 355 (1987); *see also infra*, at 25-27. In this case, then, plaintiff had no choice but to contrive some new legal theory in an attempt to extend the reach of the Illinois courts to Charter. Plaintiff alleged that Charter participated in a "conspiracy" with companies in the asbestos business, which allegedly agreed to hide the dangers of asbestos from their employees. However, plaintiff alleged no facts in support of the conclusory allegations in the Complaint, and offered none in response to Charter's motion to dismiss, even though Charter submitted the affidavit of Peter M. Thwaite directly refuting any possible facts upon which a "conspiracy" theory of jurisdiction could be based.

In the absence of any facts contradicting Charter's showing on its motion to dismiss, the lower court's finding of jurisdiction can only be based on the bare allegations of conspiracy in the Complaint. These allegations are an insufficient basis for the exercise of personal jurisdiction over Charter because: (1) the Illinois Supreme Court has never upheld jurisdiction under a conspiracy theory, which, if it is viable at all, is disfavored in Illinois; (2) on their face, the allegations in the Complaint do not properly allege that Charter engaged in a conspiracy, particularly in that plaintiff has made no showing that the other alleged co-conspirators were Charter's "agents" (a prerequisite to jurisdiction over Charter under a conspiracy theory); and (3) the assertion of personal jurisdiction over Charter through bare allegations of a conspiracy would violate due process.

1. The Illinois Supreme Court Has Never Accepted The Conspiracy Theory of Personal Jurisdiction

The Illinois Supreme Court has on only one occasion addressed the question of whether personal jurisdiction may be asserted based upon a defendant's alleged participation in a conspiracy. In *Green v. Advance Ross Electronics Corp.*, 86 Ill. 2d 431, 427 N.E. 2d 1203 (1981), the Supreme Court *rejected* the conspiracy theory as a basis for personal jurisdiction in that case. The Supreme Court specifically noted that the conspiracy theory has been questioned as a valid basis for imposing jurisdiction. *Green*, 86 Ill. 2d at 440-41, 427 N.E.2d at 1208. The Supreme Court cited *Chromium Industries, Inc. v. Mirror Polishing & Plating Co.*, 448 F. Supp. 544, 552 (N.D. Ill. 1978), an antitrust case, in which the United States District Court for the Northern District of Illinois stated:

> Conspiratorial activities having tortious consequences in this district, at least in the amount shown here, are not a sufficient basis for jurisdiction in the absence of any other contacts. If jurisdiction could

> be established by merely alleging that a corporate defendant participated in a conspiracy and that one member of the conspiracy committed a tort in the district, antitrust plaintiffs would be able to reach absent co-conspirators with no independent contacts with the forum. We see no basis for engrafting a broad conspiratorial accretion on the scope of the long-arm statutes.

Chromium Industries, Inc., 448 F. Supp. at 552 (citation omitted).

In *dicta*, the *Green* court outlined the very limited factual circumstances in which a conspiracy allegation might support jurisdiction, if that theory were ever recognized in Illinois. The Supreme Court explained that "[t]he theory of jurisdiction based on the acts of a co-conspirator must be that co-conspirators are each others' agents; thus the argument would be that when a conspirator commits a tortious act within Illinois he does so as agent for his co-conspirators, who thereby also become subject to this State's jurisdiction." *Green*, 86 Ill. 2d at 440-41, 427 N.E.2d at 1208. Thus, to the extent such a theory is viable under Illinois law,[6] a plaintiff must demonstrate (by a preponderance of the evidence) the existence of a conspiracy; the commission of a tortious act within the state; and that the act was performed by one of the co-conspirators as agent for another. *Green*, 86 Ill. 2d at 440-41, 427 N.E.2d at 1208. As explained below, plaintiff has failed to plead sufficiently these requirements, and has thus failed to meet even a *prima facie* standard (much less proof by preponderance of the evidence).

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[6] Of course, Charter agrees with the *Chromium Industries* court that the conspiracy theory of personal jurisdiction is invalid under any circumstances.

2. Plaintiff Fails To Allege A Conspiracy Involving Charter

a. Lack of Particularity

That a conspiracy must be pleaded with particularity in order to establish jurisdiction is consistent with the general rule that "[t]he factual basis for assertion and existence of jurisdiction over the person of a nonresident defendant depends upon the allegations of facts in the complaint before th[is] court." *First Nat'l Bank of Chicago v. Screen Gems, Inc.*, 40 Ill. App. 3d 427, 433, 352 N.E.2d 285, 290 (1st Dist. 1976). Failure to include allegations of a nonresident corporation's acts upon which an Illinois court can base jurisdiction is fatal to a complaint. *Reeves v. Baltimore & Ohio R.R. Co.*, 171 Ill. App. 3d 1021, 526 N.E.2d 404 (1st Dist. 1988); *see also Heller Financial, Inc. v. Conagra, Inc.*, 166 Ill. App. 3d 1, 520 N.E.2d 922 (1st Dist. 1988).

Plaintiff's Complaint fails to allege detailed facts which show the existence of a conspiracy. Just as bare conspiracy allegations are insufficient to plead conspiracy as a matter of substantive liability, *Hume & Liechty Veterinary Assocs. v. Hodes*, 259 Ill. App. 3d 367, 369, 632 N.E.2d 46, 48 (1st Dist. 1994), *Dymek v. Nyquist*, 128 Ill. App. 3d 859, 469 N.E.2d 659, 83 (1st Dist. 1984), they are insufficient for jurisdictional purposes as well:

> The cases are unanimous that a bare allegation of conspiracy between the defendant and a person within the personal jurisdiction of the court is not enough. Otherwise plaintiffs could drag defendants to remote forums for protracted proceedings even though there were grave reasons for questioning whether the defendant was [actually] suable in those forums.

Ahmed v. Quinn, No. 95 C 6673, 1996 WL 388418, at *4 (N.D. Ill. July 9, 1996) (quoting *Stauffacher v. Bennett*, 969 F.2d 455, 460 (7th Cir. 1992) (applying the Wisconsin long-arm statute), *cert. denied*, 506 U.S. 1034 (1992)). Rather, a plaintiff is required to plead the "ultimate facts" linking a defendant with the purported conspiracy. *Dymek*, 128 Ill.

App. 3d at 866, 469 N.E.2d at 666. Specifically, the plaintiff must allege facts demonstrating that the defendant "understands the general objectives of the conspiratorial scheme, accepts them, and agrees, either explicitly or implicitly to do its part to further these objectives." *Adcock v. Brakegate, Ltd.*, 164 Ill. 2d 54, 64, 645 N.E.2d 888, 894 (1995).

Herein, the conspiracy allegations against Charter are insufficient on their face. First, the Complaint omits Charter from the list of "Co-Conspirators" contained in paragraph 2 of the Complaint. Instead, Charter is defined as a "Defendant" and not as a "Co-Conspirator." Second, insofar as the Complaint states that the Co-Conspirators conspired with each other and with the other Defendants, the Complaint fails to specify which of the Defendants was a member of the conspiracy or, more importantly, how any of the Defendants participated in the conspiracy. (Complaint, ¶¶ 8-15 (A026-29) (R. C 11-15)) Indeed, the Complaint does not even purport to make particularized allegations, stating instead that "[o]ne or more" unspecified Co-Conspirators or Defendants committed various overt acts. Charter is not identified as committing *any* act in connection with the conspiracy, nor are any facts alleged concerning Charter's knowledge of or participation in the conspiracy. *Id.* Thus, the Complaint fails to allege that Charter "underst[ood] the general objectives of the conspiratorial scheme, accept[ed] them, and agree[d], either explicitly or implicitly to do its part to further these objectives." *Adcock*, 164 Ill. 2d at 64, 645 N.E.2d at 894. Because the Complaint's allegations fail, on their face, to establish Charter's participation in a conspiracy, they cannot possibly provide a basis for jurisdiction as to Charter.

b. Failure to Challenge the Thwaite Affidavit

Moreover, plaintiff's failure to refute Mr. Thwaite's statements in his sworn affidavit – that Charter never engaged in either any aspect of the asbestos business or any conspiracy with any of the defendants – precludes plaintiff from establishing jurisdiction based on a conspiracy theory. Mr. Thwaite's affidavit explained in great detail the nature of

Charter's business and its arms' length relationship with Cape. (R. C 348-357 (A006-15), ¶¶ 4-23) The affidavit concluded:

> Charter, either by itself or through its agents, employees, or representatives, has never mined, processed, sold or distributed raw asbestos or asbestos-containing products, nor has Charter, either by itself or through its agents, employees, or representatives, conspired with any party to distribute asbestos or asbestos-containing products.

(Thwaite Aff., ¶ 4, (A007-8) (R. C 348)) Plaintiff failed to submit an affidavit controverting these sworn statements or the detailed factual statements upon which they are based.

It is well-settled in Illinois that, "[i]f a defendant's affidavit contesting jurisdiction is not refuted by a counter-affidavit filed by the plaintiff . . . [then] the facts alleged in the defendant's affidavit are accepted as true." *Kutner v. DeMassa*, 96 Ill. App. 3d 243, 248, 421 N.E.2d 231, 235 (1st Dist. 1981). In *Kutner*, plaintiff merely alleged, in conclusory fashion, that certain co-conspirators, acting as defendant's agents, perpetrated a tort in Illinois. *Kutner*, 96 Ill. App. 3d at 243-45, 248, 421 N.E.2d at 232-33, 235. Plaintiff failed to plead any facts which demonstrated that an agency relationship existed between the alleged co-conspirators and the defendant, or that the defendant "agreed, schemed, or conspired" to injure the plaintiff. By contrast, the defendant submitted an affidavit in direct contradiction of the plaintiff's conspiracy allegations. Accordingly, based upon the plaintiff's vague assertion of conspiracy and his failure to refute the defendant's affidavit, the court denied jurisdiction over the defendant. *Kutner*, 96 Ill. App. 3d at 249, 421 N.E.2d at 236; *see also Alpert v. Bertsch*, 235 Ill. App. 3d. 452, 463, 601 N.E.2d 1031, 1038 (1st Dist. 1992).

As noted above, plaintiff's motion to strike Thwaite's affidavit was denied. (A005) (R. C 979) Plaintiff never filed a counter-affidavit, nor made any other attempt to refute the factual assertions contained in the affidavit. Thus, Mr. Thwaite's uncontroverted affidavit – specifically stating that Charter neither participated in the asbestos business nor in a conspiracy with the defendants – bars plaintiff from establishing the ultimate facts required for the assertion of jurisdiction over Charter based on a theory of conspiracy.

c. No Showing of Agency

Even if plaintiff could properly allege a conspiracy involving Charter, jurisdiction could not be asserted unless the plaintiff could establish that one of the co-conspirators committed acts in Illinois as Charter's *agent*. As the Illinois Supreme Court stated in *Green*,

> It is not true that if one conspirator is subject to Illinois jurisdiction so are all the others. Rather, the theory of jurisdiction based on the acts of a co-conspirator must be that co-conspirators are each others' agents; thus the argument would be that when a conspirator commits a tortious act within Illinois he does so as agent for his co-conspirators . . .

Green, 86 Ill. 2d at 440-41, 427 N.E.2d at 1208.

The mere existence of a parent-subsidiary relationship, as formerly existed (but no longer exists) between Charter and Cape, is insufficient by itself to create an agency relationship that would support the exercise of jurisdiction. *Wissmiller v. Lincoln Trail Motosports*, 195 Ill. App. 3d 399, 403, 552 N.E.2d 295, 298 (4th Dist. 1990); *In re Schwinn Bicycle Co.*, 192 B.R. 461, 476 (Bankr. N.D. Ill. 1996) ("Even existence of a parent-subsidiary relationship is not sufficient to make the subsidiary the parent's agent for jurisdictional purposes"). Rather, to demonstrate agency, a plaintiff must allege sufficient indicia of an agency relationship, *i.e.*, whether intent existed to create an agency relationship; whether the agent acted for the benefit of the principal; and, finally, whether the agent was under the control of the principal. *See generally* HAROLD GILL REUSCHLEIN & WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP §§ 3-5, at 11-13 (2d ed. 1990).

Here, plaintiff has failed to allege either an intent to create an agency relationship, or control of an alleged "agent" by Charter. For example, plaintiff has failed to allege that any of the named defendants or co-conspirators acted under authority from Charter. Plaintiff here has failed to plead that *any* of the named defendants or co-defendants were acting under Charter's authority, or for Charter's benefit. On the other hand, Charter's Peter Thwaite provided a lengthy and detailed affidavit describing Charter's relationship with Cape and negating any possible conspiracy or agency relationship between them or any other defendant. Mr. Thwaite concluded as follows:

> 24. As set forth above, Charter has never engaged in any aspect of the asbestos business, nor has Charter participated in the asbestos business that at one time was carried on by Cape. Accordingly, plaintiff's allegation that Charter somehow was part of a conspiracy to distribute asbestos and to suppress medical research regarding asbestos is incorrect and without any basis in fact. Charter never conspired with Cape or anyone else, nor has Cape or any of the other defendants named in the complaint ever acted as an agent of Charter.

(R. C 348-357 (A006-15), ¶ 24) In response, plaintiff did not even attempt to state facts that might have suggested that Mr. Thwaite's statements are incorrect or even suspect.

Plaintiff thus has failed to demonstrate any agreement or scheme between Charter and the other defendants. Instead, as it stands, the plain language of the Complaint, which is devoid of any substantive facts and which does not include Charter in the group of "co-conspirators," leads to the inevitable conclusion that plaintiff has not even alleged that Charter participated in a conspiracy. Therefore, plaintiff cannot purport to invoke this Court's long-arm jurisdiction based on conspiracy theory.

3. The Exercise Of Jurisdiction Over Charter Based Upon Plaintiff's Bare Allegations Of Conspiracy Would Be Inconsistent With Due Process

Finally, the exercise of jurisdiction over Charter based upon acts in Illinois of other defendants would violate due process. It is well-settled that as a matter of due process, jurisdictional contacts must be measured with respect to each particular defendant, and may not be assessed based on another defendant's activities. *E.g.*, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n. 13 (1984) ("Each defendant's contacts with the forum State must be assessed individually"); *Rush v. Savchuk*, 444 U.S. 320, 332 (1980) ("The requirements of *International Shoe* . . . must be met as to each defendant over whom a state court exercises jurisdiction"); *Johnston v. Pneumo Corp.*, 652 F. Supp. 1402, 1406 (S.D. Miss. 1987) ("The law is established that each defendant's contacts with the forum state must be assessed on an *individual basis*") (emphasis original); *Siskind v. Villa Found. For Educ., Inc.*, 642 S.W. 2d 434, 437-38 (Tex. 1982) ("it is the contacts of the defendant himself that are determinative"); *Rambo v. American S. Ins. Co.*, 839 F.2d 1415, 1417 n.3 (10th Cir. 1988) ("due process requirements for personal jurisdiction must be met as to each individual [d]efendant") (citation omitted); *Falik v. Smith*, 884 F. Supp. 862, 866 (S.D.N.Y. 1995) (" '[j]urisidiction depends only upon each defendant's relationship with the forum . . . Regardless of their joint liability, jurisdiction over each defendant must be established individually' ").

Because Charter has had no contacts with Illinois, it would be fundamentally unfair to hale Charter into an Illinois court based on the conduct of another party. *See Buxton v. Wyland Galleries Hawaii*, 275 Ill. App. 3d 980, 982-83, 657 N.E.2d 708, 710 (4th Dist. 1995), *appeal denied*, 165 Ill. 2d 548, 662 N.E.2d 422 (1996). Moreover, the conspiracy theory of jurisdiction has been criticized for merging "the jurisdictional issue with the merits." *Stauffacher*, 969 F.2d at 459. This is because the question of personal jurisdiction is distinct from the question of substantive liability. *Bell v. Hood*, 327 U.S. 678, 682 (1946); *Stauffacher*, 969 F.2d at 460. It would be a violation of due process and fundamentally unfair for Charter to be forced to submit to the jurisdiction of the Illinois courts solely on the basis of plaintiff's conclusory conspiracy allegations.

D. Charter Is Not Subject to *In Personam* Jurisdiction Under Any Theory

Once the inadequacy of a conspiracy theory of jurisdiction is recognized, it remains only to examine the undisputed facts that Charter presented below to confirm that Charter simply cannot be subject to personal jurisdiction under any theory. The facts show emphatically that Charter did not have sufficient contacts with Illinois on which the lower court could base jurisdiction. Further, every court that has considered the issue (including this Court and the court below) has ruled not only that Charter itself has no contacts with Illinois, but that Cape is not the "alter-ego" of Charter.

For example, in *Mohn*, this Court held that:

> Neither Charter nor its wholly-owned subsidiary directly engaged in mining, production, marketing, or shipping of asbestos or asbestos products. Charter is not qualified to do business in Illinois. It does not: sell products, purchase goods or services, lease or own property, maintain a post office box, or have directors, officers or employees in Illinois. It does not: pay taxes or franchise fees, have an Illinois bank account, or advertise in the State. It has never brought suit in Illinois.

Mohn, 147 Ill. App. 3d at 718, 498 N.E.2d at 376 (copy included in the previously filed Separate Appendix to Charter's Petition for Leave to Appeal, at A002-5). The Court further determined that Charter was not the *alter ego* of Cape because:

> The companies maintain separate locations, bank accounts, and records. Under English law, their incomes are consolidated for statutory accounting purposes. Francis Howard, one of Charter's executive directors and a member of Cape's board of directors, stated that Charter is not involved in Cape's day-to-day operations nor with the day-to-day operation of Cape's subsidiaries.

Mohn, 147 Ill. App. 3d at 718, 498 N.E.2d at 376.

This Court's ruling in *Mohn* is consistent with every other Illinois court to address the issue of personal jurisdiction over Charter. In 1985, the Circuit Court of the Eleventh Judicial Circuit granted Charter's motions to dismiss the complaint in three asbestos-related actions, finding that jurisdiction did not exist over Charter based upon Cape's alleged activities within the forum. *Wehmeier v. UNR Indus.*, No. 82-L-80 (11th Cir. McLean County, Ill., Nov. 27, 1985); *Gowen v. Unarco Indus.*, No. 83-L-140 (11th Cir. McLean County, Ill., Nov. 27, 1985); *Lafever v. Unarco Indus.*, No. 84-L-224 (11th Cir. McLean County, Ill., Nov. 27, 1985) (copies included in the previously filed Separate Appendix at A006-7).

Similarly, on December 1, 1988, the Circuit Court of the Eleventh Judicial District granted Charter's motions to dismiss ten separate actions commenced between 1983 and 1988. In each of those decisions the court, relying upon *Mohn* and other authorities, held (1) "[t]hat there [had] been no showing that the Charter defendants [had] engaged in any activity at any time in Illinois . . . which would subject them to the *in personam* jurisdiction of the Illinois courts;" and (2) that the Charter defendants were not subject to jurisdiction as the *alter ego* of Cape or any of Cape's subsidiaries. *Robbins v. Brakegate, Ltd.*, No. 83-L-300 (11th Cir. McLean County, Ill., Dec. 1, 1988); *Denham v. Unarco Indus.*, No. 85-L-360 (11th Cir. McLean County, Ill., Dec. 1, 1988); *Kessinger v. Unarco Indus.*, No. 85-L-359 (11th Cir. McLean County, Ill., Dec. 1, 1988); *Hammond v. Unarco Indus.*, No. 86-L-128 (11th Cir. McLean County, Ill., Dec. 1, 1988); *Wolford v. Unarco Indus.*, No. 87-L-104 (11th Cir. McLean County, Ill., Dec. 1, 1988); *Kessinger v. North American Asbestos Corp.*, No. 87-L-120 (11th Cir. McLean County, Ill., Dec. 1, 1988); *Swank v. Brakegate, Ltd.*, No. 87-L-292 (11th Cir. McLean County, Ill., Dec. 1, 1988); *Smith v. Brakegate, Ltd.*, No. 87-L-293 (11th Cir. McLean County, Ill., Dec. 1, 1988); *Hernandez v. Brakegate, Ltd.*, 87-L-294 (11th Cir. McLean County, Ill., Dec. 1, 1988); *Adcock v. Brakegate, Ltd.*, No. 87-L-306 (11th Cir. McLean County, Ill., Dec. 1, 1988) (copies included in the previously filed Separate Appendix at A008-187).

As recently as January, 1990, the Circuit Court for the Eleventh Judicial Circuit dismissed an asbestos-related action filed against Charter based upon lack of jurisdiction. *Johnson v. Charter Consolidated, P.L.C.*, No. 89-L-187 (11th Cir. McLean County, Ill., Jan. 31, 1990) (copies included in the previously filed Separate Appendix at A188).

This overwhelming weight of authority should, by itself, establish that Charter is not subject to personal jurisdiction in Illinois. However, even apart from these rulings, the uncontroverted evidence in this case clearly shows that *in personam* jurisdiction cannot attach to Charter under any theory.

1. Charter Is Not Subject To *In Personam* Jurisdiction Under The Illinois Long-Arm Statute Or The Illinois Personal Service Statute

The assertion of personal jurisdiction over Charter based on its own contacts with Illinois would be inconsistent with the Illinois long-arm and personal service statutes, as well as federal and state due process. This is because the unrefuted evidence illustrates that Charter simply has not had the necessary "minimum contacts" with Illinois. Plaintiff's cause of action is based upon the defendants' alleged manufacture and distribution of asbestos and asbestos-containing products. Because Charter has never engaged in any aspect of the asbestos business, either in Illinois or anywhere else (Thwaite Aff., ¶ 4 (A006-15) (R. C 348-357)), any contact Charter might have with Illinois would be unrelated to plaintiff's cause of action and therefore must satisfy the standards for general jurisdiction under Illinois's personal service statute. *R.W. Sawant*, 111 Ill. 2d at 313, 489 N.E.2d at 1365. The personal service statute is not satisfied in this case because Charter has not had "continuous and systematic" contacts "with a fair measure of permanence and continuity" with the State. *R.W. Sawant*, 111 Ill. 2d at 313, 489 N.E.2d at 1365.

Indeed, the Thwaite Affidavit confirms that Charter has not committed *any* acts in the State of Illinois. (Thwaite Aff., ¶ 6 (A006-15) (R. C 348-357)) Charter has never been registered or qualified to do business in Illinois, and it has never maintained an office in Illinois. No director, officer. or employee of Charter has ever resided or conducted business in Illinois. Charter has never owned or leased real property, maintained a post office box or telephone, or advertised in the State of Illinois. Charter has never had a registered agent for service of process here, and it has never paid taxes or franchise fees or commenced a lawsuit in Illinois. (*Id.*)

Under these circumstances, the exercise of jurisdiction over Charter would offend all notions of " 'fair play and substantial justice.' " *Buxton*, 275 Ill. App. 3d at 982-83, 657 N.E.2d at 710 (citation omitted). This is particularly true in Charter's case because Charter is the resident of a foreign country, and "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *Asahi*, 480 U.S. at 114; *see also Buxton*, 275 Ill. App. 3d at 982-83, 657 N.E.2d at 710 (noting that "inconvenience may at some point become so substantial as to achieve *constitutional* magnitude") (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 483 n.26 (1985)) (emphasis in original).

2. Charter Is Not The Alter Ego Of Cape Or Of Cape's Subsidiaries

Plaintiffs in the past have contended that Charter is subject to jurisdiction on an *alter ego* theory by virtue of Charter's previous investment relationship with Cape. However, as numerous Illinois courts have held in previous litigation involving Charter, and as shown in the Thwaite Affidavit and the discussion below, the "corporate veil" of Cape and its subsidiaries cannot be pierced to hold Charter subject to jurisdiction in Illinois. Cape and its subsidiaries are completely separate and independent entities, and the corporate integrity of each of those companies has always been respected by Charter. Thus, this theory of jurisdiction is also unavailing.

a. Illinois Courts Pierce The Corporate Veil Only Under Exceptional Circumstances

Under Illinois law, piercing the corporate veil is an extraordinary remedy to be granted only "in those exceptional circumstances where to adhere to the fiction [of separate corporate legal entities] would sanction a fraud or promote injustice." *B. Kreisman & Co. v. First Arlington Nat'l Bank of Arlington Heights*, 91 Ill. App. 3d 847, 850, 415 N.E.2d 1070, 1072 (2d Dist. 1980). In fact, under Illinois law, in order to pierce the corporate veil a plaintiff must demonstrate that: (1) there is "such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist;" and (2) adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice." *Alpert*, 235 Ill. App. 3d at 460, 601 N.E.2d at 1036; *see also Great Lakes Overseas, Inc. v. Wah Kwong Shipping Group, Ltd.*, 990 F.2d 990, 996 (7th Cir. 1993). A plaintiff seeking to pierce the corporate veil has a heavy burden, then, because "[a] corporate entity will be disregarded and the veil of limited liability pierced" only where a fraud has been perpetuated, and to do otherwise "would . . . present an obstacle to the protection of private rights or where the corporation is merely the . . . business conduit of a governing or dominating personality." *Alpert*, 235 Ill. App. 3d at 460, 601 N.E.2d at 1036. Thus, the fact that the subsidiary is wholly owned and shares officers with the parent are not alone a sufficient basis for exercising *in personam* jurisdiction over a parent where jurisdiction exists over the subsidiary. *Betar v. De Havilland Aircraft of Canada Ltd.*, 80 F.R.D. 400, 401 (N.D. Ill. 1977), *rev'd on other grounds*, 603 F.2d 30 (7th Cir. 1979), *cert. denied*, 444 U.S. 1098 (1980); *accord Graco, Inc. v. Kremlin, Inc.*, 558 F. Supp. 188, 191 n.3 (N.D. Ill. 1982) ("common directors and officers of a parent and its [wholly owned] subsidiary is not enough, by itself, to confer jurisdiction over a nonresident parent corporation"); *see also Main Bank of Chicago v. Baker*, 86 Ill. 2d 188, 204-05, 427 N.E.2d 94, 101 (1981) (neither stock ownership nor common officers and directors alone creates an *alter ego* relationship, as "[t]hese practices are common and exist in most parent-subsidiary relationships"). Instead, the nature or degree of the dominance that must be shown in order for a subsidiary to be considered the *alter ego* or a "mere department" of its parent has been characterized as actual and pervasive "control" over the subsidiary's daily operations. *See Betar*, 80 F.R.D. at 401 ("[t]he maintenance of separate records, separate offices and a *Bona fide* business purpose" control a court's determination of whether the corporate structure is a "fiction").

The principle of corporate separateness is equally applicable to the issue of *in personam* jurisdiction. The United States Supreme Court has long recognized that the activities of a subsidiary do not subject a parent corporation to *in personam* jurisdiction in the state where the subsidiary is located. *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 336 (1925).[7] Moreover, overwhelming authority in Illinois establishes that significant stock ownership and overlapping directors are not sufficient to subject a parent corporation to jurisdiction based on the subsidiary's contacts with Illinois. *E.g., Rae Prod. and Chemicals Corp. v. Koch Materials, Co.*, No. 93 C 4818, 1995 WL 715884 (N.D. Ill. Dec. 1, 1995) (where plaintiff failed to allege sufficient factors to demonstrate total domination of the subsidiary by the parent, or that the subsidiary was an "agent" of the parent, court declined to exercise jurisdiction over parent based on acts of wholly owned subsidiary within the forum); *Sportmart, Inc. v.*

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[7] Under the *Cannon* doctrine, the legal distinction between affiliated corporations is respected where the "corporate separation [is] real [and] not pure fiction." *Cannon*, 267 U.S. at 337. In *Cannon*, the Court noted that through complete ownership of the subsidiary's capital stock, the parent "exert[ed] its control both commercially and financially" and dominated the subsidiary "immediately and completely." *Cannon*, 267 U.S. at 335. The subsidiary had been established solely to market the parent's products in North Carolina, a function performed in other states by unincorporated divisions of the parent company. Despite the extensive "control" by the parent over the subsidiary, the Court declined to pierce the corporate veil based on its finding that "[t]he existence of the [subsidiary] as a distinct corporate entity [was] in all respects observed." *Cannon*, 267 U.S. at 335.

Frisch, 537 F. Supp. 1254 (N.D. Ill. 1982) (where evidence showed that parent did not participate in operating decisions of subsidiary, court declined to exercise jurisdiction over parent based on acts of subsidiary within the forum); *John O. Butler Co. v. Standard Oil Co.*, 365 F. Supp. 501, 503 (N.D. Ill. 1973) (court declined to exercise jurisdiction over parent where parent and subsidiary were separately incorporated and, while directors overlapped, each board was distinct and included members not on the other's board).

Finally, under Illinois law, where a nonresident parent acquires shareholder control of an entity already engaged in an established business in the forum and remains passive with respect to the subsidiary's management, finances and operations, then the parent will not be regarded as the subsidiary's *alter ego*. *Connelly v. Uniroyal, Inc.*, 55 Ill. App. 3d 530, 370 N.E.2d 1189 (1st Dist. 1977) (where subsidiary had conducted the same business which had resulted in the plaintiff's injury "long before [the parent's] acquisition of its stock," and parent never participated in the manufacture of the subsidiary's products, jurisdiction did not attach even though, at the time of the commission of the tort, the parent owned 95 percent of the subsidiary's stock, two of the subsidiary's directors were directors, officers or employees of the parent, and the product carried the parent's trademark), *aff'd in part and rev'd in part*, 75 Ill. 2d 393, 389 N.E.2d 155 (1979) (affirming the finding with respect to the parent's non-liability), *cert. denied*, 444 U.S. 1060 (1980).

The court's holding in *Connelly* is particularly applicable here because Cape existed as an independent company for over 70 years before Charter was formed. Moreover, as in *Connelly*, Charter has never participated in Cape's manufacture of products. The only contacts between Charter and Cape were Charter's shareholding interest in Cape and its minority representation on Cape's Board of Directors. These contacts are insufficient to render Cape the *alter ego* of Charter, and therefore none of Cape's activities at any time can furnish a basis for this Court's exercise of *alter ego* jurisdiction over Charter.

b. Charter Is Not The Alter Ego Of Cape

An analysis of the relationship between Charter and Cape shows that Cape always has been operationally, financially, and commercially independent of Charter.[8] Thus:

(1) Charter and Cape are engaged in entirely different businesses, their operations are completely separate and they do business from separate offices. (Thwaite Aff., ¶ 17 (A006-15) (R. C 348-357))

(2) All corporate formalities have been observed. (*Id.*, ¶¶ 16-20 (A006-15) (R. C 348-357))

(3) Cape was not incorporated by Charter, and is adequately and independently capitalized. (*Id.*, ¶¶ 10, 11, 19 (A006-15) (R. C 348-357))

(4) Charter and Cape never had officers or directors in common other than Charter's minority, non-executive representation on Cape's Board (which ceased as of July 18, 1996), and Cape's Board and management are independent of Charter. (*Id.*, ¶¶ 14-16 (A006-15) (R. C 348-357)).

(5) Charter has never sought a common corporate identification with Cape. (*Id.*, ¶ 20 (A006-15) (R. C 348-357))

(6) Cape and its subsidiaries have never been treated as divisions or "departments" of Charter. (*Id.*, ¶¶ 16-20 (A006-15) (R. C 348-357))

(7) Charter has never been involved in the day-to-day management or the business affairs of

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[8] Charter has had no connections of any kind with Cape's operating subsidiaries. (Thwaite Aff., ¶¶ 22-23 (A006-15) (R. C 348-357). Accordingly, in order to prove that Charter is subject to jurisdiction in Illinois, plaintiffs must show (1) that Cape is the *alter ego* of one or more of its former asbestos subsidiaries and that one or more of those subsidiaries is subject to jurisdiction in Illinois, and (2) that Cape is the *alter ego* of Charter.

Cape, and Charter does not pay Cape's operating expenses. (*Id.*, ¶¶ 19-20 (A006-15) (R. C 348-357))

(8) Charter has not shared financial or accounting facilities with Cape. (*Id.*, ¶¶ 18-19 (A006-15) (R. C 348-357))

(9) As of July 18, 1996, Charter sold all of its Cape shares, and Charter currently has no investment or other relationship with Cape. (*Id.*, ¶ 13 (A006-15) (R. C 348-357))

See Graco, 558 F. Supp. at 191 (citing *alter ego* factors). On the basis of these facts, plaintiff cannot sustain her burden of establishing that Cape is a "mere department" of Charter or that Charter exercises actual and pervasive control over Cape's day-to-day operations. *Betar*, 80 F.R.D. at 401. Moreover, there is absolutely no evidence in this case that Charter abused the corporate form to perpetrate a fraud or injustice, as is required by Illinois law. *Alpert*, 235 Ill. App. 3d at 460, 601 N.E.2d at 1036.

Accordingly, there is nothing in the relationship between Charter and Cape that would justify piercing the corporate veil to exercise jurisdiction over Charter. Cape and its subsidiaries have always been financed, managed, and operated independently of Charter. Neither Cape nor any of its subsidiaries has ever been so dominated by Charter that it has been a "mere department" of Charter, with no separate mind, will, or existence of its own. Indeed, the only relationship that has ever existed between Charter and Cape is that of an investor to an investment. Without more, that relationship is insufficient to support a finding that Cape is the *alter ego* of Charter. Thus, Charter cannot be subjected to *in personam* jurisdiction in Illinois based on the acts of Cape or Cape's subsidiaries.

CONCLUSION

The lower court erred in ruling that plaintiff's conclusory conspiracy allegations are by themselves sufficient to support jurisdiction over Charter in Illinois. Charter came forward with persuasive evidence that it did not have sufficient contacts with Illinois, and plaintiff, which bears the burden to show a sufficient basis for jurisdiction, did nothing more than refer to the allegations of conspiracy. The lower court, contrary to the uncontroverted facts, the overwhelming weight of authority, and even the most elemental notions of fairness, found that the Complaint is enough. It is not, and this Court should therefore reverse the lower court's ruling and instruct the lower court to enter an order dismissing Charter from the case for lack of personal jurisdiction.

Respectfully submitted,

Charter plc

By: /s/ John Frey
One of its attorneys

John E. Frey, Esq.
David Simon, Esq.
Wildman, Harrold Allen & Dixon
225 Wacker Drive
Chicago, Illinois 60606-1229
(312) 201-2000

Of Counsel:
Werner Polak, Esq.
Stephen Fishbein, Esq.
Shearman & Sterling
Citicorp Center
153 East 53rd Street
New York, New York 10022
(212) 848-4000

IN THE CIRCUIT COURT FOR THE ELEVENTH JUDICIAL CIRCUIT McLEAN COUNTY, ILLINOIS

MARGE CAMERON, Individually and as Special Administrator of the Estate of J. Bernard Latta, Deceased,	)	
Plaintiff,	)	**No.: 95 L 112**
vs.	)	
OWENS-CORNING FIBERGLAS CORPORATION, et al.,	)	**(Filed Nov. 14, 1996)**
Defendants.	)	

CHARTER PLC'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

Pursuant to its special and limited appearance and 735 ILCS 5/2-301, defendant Charter plc respectfully moves the Court to dismiss the complaint against defendant Charter plc for lack of jurisdiction over defendant Charter plc. A memorandum in support is attached hereto.

Wherefore, defendant Charter plc respectfully requests that the Court enter an order pursuant to 735 ILCS 5/2-301 dismissing the complaint against defendant Charter plc for lack of jurisdiction over defendant Charter plc.

Respectfully submitted,

Charter plc

By: /s/ David Simon
One of its attorneys

John E. Frey
David M. Simon
Wildman, Harrold, Allen & Dixon
225 West Wacker Drive
Chicago, Illinois 60606
(312) 201-2000

IN THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT
McLEAN COUNTY, ILLINOIS

MARGE CAMERON, Individually and as Special Administrator of the Estate of J. Bernard Latta, deceased, Plaintiff, v. OWENS-CORNING FIBERGLAS CORPORATION, ET AL., Defendants.	NO. 95-L-112

MEMORANDUM OF DEFENDANT CHARTER CONSOLIDATED P.L.C. IN SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT FOR LACK OF PERSONAL JURISDICTION

WILDMAN, HARROLD, ALLEN & DIXON

225 West Wacker Drive
Chicago, Illinois 60606-1229
Telephone: (312) 201-2000
Facsimile: (312) 201-2555

COUNSEL FOR CHARTER CONSOLIDATED P.L.C.

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4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1069 (2d ed. 1987) 27

Preliminary Statement

Charter Consolidated P.L.C. ("Charter") submits this memorandum in support of its motion pursuant to section 2-301 of the Illinois Code of Civil Procedure, to dismiss plaintiff's Complaint (the "Complaint") for lack of *in personam* jurisdiction.

Plaintiff commenced this action to recover damages for injuries allegedly suffered as a result of exposure to asbestos and asbestos-containing materials supplied by the named defendants. (Complaint at 1-4). The Complaint fails, however, to establish any basis for the exercise of *in personam* jurisdiction over Charter.

First, Charter is a United Kingdom company which has never engaged in any aspect of the asbestos business and which has never done any business in Illinois. Charter thus has not had any contacts with this State that would subject it to the Court's jurisdiction pursuant to the terms of the Illinois long-arm and personal service statutes and the requirements of the due process clauses of the Fourteenth Amendment and the Illinois Constitution.

Second, while plaintiff may contend that alleged asbestos-related activities of subsidiaries of Cape P.L.C. ("Cape") are attributable to Charter, this theory of jurisdiction also would be unavailing. The accompanying affidavit of Peter M. Thwaite (hereinafter, the "Thwaite Aff." attached hereto as Exhibit A) confirms that Cape – formerly a partially owned, publicly held subsidiary of Charter – is an independent company and that Charter has never controlled any aspect of Cape's or its subsidiaries' businesses. As of July 18, 1996, Charter disposed of its entire shareholding in Cape and since that time, Charter has had no interest in Cape whatsoever. Similar *"alter ego"* allegations have been made unsuccessfully in other asbestos-related actions filed against Charter. However, every court to have finally resolved the issue, including numerous Illinois courts, has held as a matter of fact and law that Charter is not the *alter ego* of Cape.

Finally, plaintiff's allegation that Charter and other named defendants participated in a conspiracy to withhold pertinent information from plaintiff regarding the health hazards and dangers posed by asbestos, (Complaint at 1-4), is insufficient to establish personal jurisdiction over Charter. Conspiracy is a theory of liability, not a theory of personal jurisdiction. To the extent some courts have, under limited circumstances, asserted jurisdiction based on a defendant's participation in a conspiracy, the plaintiff has been required to allege specific jurisdictional facts which are entirely absent from the complaint in this case.

Statement Of Facts

A. Charter And Its Business

Charter is an investment holding company, incorporated in 1964 under the laws of the United Kingdom as Charter Consolidated P.L.C. In 1993, Charter plc was formed and acquired all of the shares of Charter Consolidated P.L.C.[1] Charter plc is publicly held and its shares are traded on the London Stock Exchange. Its place of business is 7 Hobart Place, London, England. Charter and its wholly owned subsidiaries at its headquarters have 41 employees. (Thwaite Aff. ¶¶ 7-8).

1. Charter has had no contacts with Illinois

Charter has had no contacts with Illinois that could subject it to *in personam* jurisdiction in this State. Charter has never been registered or qualified to do business in Illinois, and it has never maintained an office in Illinois. No director, officer, or employee of Charter has ever resided or conducted business in Illinois. Charter has never owned or leased real property, maintained a post office box or telephone, or advertised in the State of Illinois. Charter has never had a registered agent for service of process here, and it has never paid taxes or franchise fees or commenced a lawsuit in Illinois. *Id.* ¶ 6).

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[1] For convenience, defendant Charter Consolidated P.L.C and its successor, Charter plc, will be referred to collectively as "Charter" unless individually identified.

2. Charter has never engaged in the asbestos business

Charter has never engaged in any aspect of the asbestos business. It has never mined, manufactured, distributed, supplied or sold asbestos or asbestos-containing products in the United States or anywhere else. *Id.* ¶ 4).

B. Cape P.L.C.

Cape is a holding company which was incorporated in 1893 under the laws of the United Kingdom. Cape is publicly held, and its stock is traded on the London Stock Exchange. Cape's principal place of business is Cape House, Iver Lane, Uxbridge, Middlesex, England. Cape owns shares of stock in companies engaged in, among other things, industrial contracting and the manufacturing of building products. *Id.* ¶ 10).

Until June 1979, Cape indirectly owned companies that mined and marketed asbestos. The assets and/or shares of those companies were sold in June 1979 to a company unaffiliated with Cape or Charter. Since that time, Cape has neither directly nor indirectly engaged in the mining or marketing of asbestos. (*Id.*).

C. Charter's Investment Relationship With Cape

Cape had been a going concern for more than 70 years before Charter acquired an interest in it. Charter first acquired an indirect interest in Cape through one of three companies that Charter acquired in 1965, The Central Mining and Investment Corporation Limited ("CMIC"). At that time, CMIC indirectly owned 16.86 percent of Cape through its subsidiary, Central Mining Finance Limited. (*Id.* ¶ 11).

From 1965 to 1969, Charter's interest in Cape increased to 25 percent through occasional open-market purchases by its wholly owned investment subsidiaries. In May 1969, Charter made a tender offer for 50 percent of the outstanding Cape shares not already owned by Charter's subsidiaries. As a result of this tender offer, Charter's interest, through its investment subsidiaries, increased to 62.5 percent in 1969. From 1969 to 1978, through open-market purchases and as an underwriter of issues of Cape stock, Charter's interest in Cape fluctuated, gradually increasing to 67.3 percent. In 1982, Charter Consolidated Investments Ltd. ("CCI"), a wholly owned subsidiary of Charter, acquired all the Cape shares held by CMF and became the only Charter subsidiary to hold Cape shares. Thereafter, Charter's holdings, through CCI, varied slightly because of the conversion of convertible preference shares. (*Id.* ¶ 12).

Effective as of July 18, 1996, Charter sold all of its Cape shares, which then amounted to 65.3 percent of Cape. Since that date, Charter has held no Cape shares and Charter has had no investment or other relationship with Cape. (*Id.* ¶ 13).

D. The Separate Finances, Policies, And Practices Of Charter And Cape

Because the businesses of Charter and Cape are completely different, all aspects of their operations have always been separate. The offices and facilities of Cape always have been completely separate from those of Charter, and Cape always has maintained a head office in a different location from that of Charter. Cape always has maintained separate bank accounts and kept separate books and records at separate locations from those of Charter. (*Id.* ¶ 17). Until Charter disposed of its Cape shares this year, Charter was required by the law of the United Kingdom to consolidate Cape's earnings with its own for accounting purposes; nevertheless, each company had separate, independent auditors until 1993, and each company always issued its own financial statements to its shareholders. *Id.* ¶ 18).

The Board of Directors of Cape always has met on a regular basis. Meetings of Cape's Board always have been held at different times and at separate locations from the Boards of Charter Consolidated P.L.C. and Charter plc. (*Id.* ¶ 16).

From 1965 to 1969, Charter nominated two non-executive directors to Cape's Board. During that time the number of directors on Cape's Board varied from eleven to fourteen. After the 1969 tender offer, Charter nominated three non-executive directors to Cape's Board, which has consisted of seven to thirteen directors for most of the years since 1969. (*Id.* ¶ 14). None of Charter's nominees, and no Charter personnel, has ever served as an officer of Cape or assumed managerial responsibilities for Cape's operations. When Charter sold its Cape shares in July 1996, all three Charter nominees on Cape's Board resigned and Charter has had no representation on Cape's Board since that time. (*Id.*).

After the 1969 tender offer, Charter invited the then Managing Director and Chairman of Cape to join Charter Consolidated P.L.C.'s Board, and he did so. He left Charter Consolidated P.L.C.'s Board in 1979; since 1980, no member of Cape's management has been on any Charter Board. The number of directors on the Board of Charter Consolidated P.L.C. has varied from ten to twenty until 1993, when Charter reorganized, and Charter plc presently has eight directors (Charter Consolidated P.L.C. has four directors). (*Id.* ¶ 15). Meetings of Charter's and Cape's shareholders are now and always have been held separately from one another (*Id.* ¶ 16).

Cape always has been separately capitalized and always has paid its own operating expenses. Cape has never borrowed funds from Charter, and Charter has never guaranteed a loan to Cape. (*Id.* ¶ 19).

Cape's management is completely independent of that of Charter. Charter has never participated in the management or day-to-day business decisions or operations of Cape. Nor has Charter ever participated in any decisions by Cape or Cape's subsidiaries regarding any aspect of the asbestos business. (*Id.* ¶¶ 20-22). Charter has never employed the name or trademarks of Cape, and Cape has never made use of the name or trademarks of Charter. (*Id.* § 20).[2]

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[2] All statements herein regarding Charter's relationship with Cape are equally true with respect to Charter's relationship with Cape's subsidiaries.

ARGUMENT

I. THIS COURT MAY NOT EXERCISE *IN PERSONAM* JURISDICTION OVER CHARTER BASED ON ITS OWN ACTIVITIES

This Court may exercise *in personam* jurisdiction over Charter based on Charter's contacts (if any) with Illinois only if plaintiff proves (i) that Charter has had jurisdiction-conferring contacts with this forum within the meaning of the Illinois long-arm statute, section 2-209 of the Illinois Code of Civil Procedure, or (ii) that Charter "has submitted to the jurisdiction of the Courts" of Illinois and is therefore subject to service of process pursuant to this State's personal service statute, section 2-208 of the Illinois Code of Civil Procedure. The exercise of personal jurisdiction under either of the Illinois statutes must also be consistent with the requirements of due process under both the Constitution of the United States and the Illinois Constitution.

A. Section 2-209: The Illinois Long-Arm Statute

The Illinois long-arm statute provides, in pertinent part, as follows:

> § 2-209. Act submitting to jurisdiction – Process. (a) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, his or her personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of such acts:
>
> (1) The transaction of any business within this State;
>
> (2) The commission of a tortious act within this State;

As the Thwaite Affidavit demonstrates, Cape's subsidiaries are completely independent of Charter. (Thwaite Aff. ¶¶ 22-23).

> (3) The ownership, use, or possession of any real estate situated in this State;
>
> * * *
>
> (c) A court may also exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States.

Ill. Code Civ. P. § 2-209 (West 1992).

Plaintiff has the burden of establishing long-arm jurisdiction over Charter. *R.W. Sawant & Co. v. Allied Programs Corp.*, Ill. 2d 304, 310, 489 N.E.2d 1360, 1363, 95 Ill. Dec. 496, 499 (1986); *Alpert v. Bertsch,* 235 Ill. App. 3d 452, 458, 601 N.E.2d 1031, 1035, 176 Ill. Dec. 333, 337 (1st Dist. 1992); *Bobka v. Cook County Hosp.*, 117 Ill. App. 3d 359, 360, 453 N.E.2d 828, 829, 73 Ill. Dec. 3, 4 (1st Dist. 1983). This Court may not exercise *in personam* jurisdiction over Charter pursuant to the long-arm statute unless: (1) the non-resident had "minimum contacts" with the forum state such that he had "fair warning" that he may be required to defend himself there; (2) the action arose out of or relates to defendant's contacts with the forum; and (3) it is reasonable to require the defendant to litigate in the forum state. *Ores v. Kennedy,* 218 Ill. App. 3d 866, 872, 578 N.E.2d 1139, 1144, 161 Ill. Dec. 493, 498 (1st Dist. 1991); *Johnson v. Ortiz,* 244 Ill. App. 3d 384, 388, 614 N.E.2d 408, 411, 185 Ill. Dec. 274, 277 (1st Dist. 1993).

The exercise of jurisdiction under the long-arm statute must also satisfy the requirements of the due process clause of the Fourteenth Amendment. *FMC Corp. v. Varonos,* 892 F.2d 1308, 1310 n.5 (7th Cir. 1990); *Johnson*, 244 Ill. App. 3d at 389, 614 N.E.2d at 411-12, 185 Ill. Dec. at 277-78. In addition to the federal minimum due process requirements, Illinois courts require that the exercise of jurisdiction over a non-resident defendant comport with "the Illinois Constitution, which contains its own separate and independent guarantee of due process. *Mors v. Williams,* 791 F. Supp. 739, 741 (N.D. Ill. 1992); *see also Rollins v. Ellwood*, 141 Ill. 2d 244, 275, 565 N.E.2d 1302, 1316, 152 Ill. Dec. 384, 398 (1990) (the Illinois Constitution's guarantee of due process "stands separate and independent from the Federal guarantee of due process").

"The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render A valid personal judgment against a nonresident defendant." *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 291 (1980). Thus, in order to satisfy the due process standard, which is a necessary element of long-arm jurisdiction, plaintiff must show that Charter has "certain minimum contacts" with Illinois such that "maintenance of the suit does not offend 'traditional notions of fair play and substantial. justice.' " *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945) (citation omitted); *Buxton v. Wyland Galleries Hawaii,* 657 N.E.2d 708, 710, 212 Ill. Dec. 507, 509 (4th Dist. 1995) (quoting *Burger King Corp. v. Rudzewic,* 471 U.S. 462, 474, 476-77 (1985)); *Mors,* 791 F. Supp. at 741. Moreover, under the Illinois Constitution, "jurisdiction is to be asserted 'only when it is fair, just, and reasonable to require a nonresident defendant to defend an action in Illinois, considering the quality and nature of the defendant's acts which occur in Illinois or which affect interests located in Illinois.' " *Mors,* 791 F. Supp. at 743 (quoting *Rollins,* 141 Ill. 2d at 275, 565 N.E.2d at 1316, 152 Ill. Dec. at 398); ILL. CONST. of 1970, art. 1, § 2 (West 1983).

In personam jurisdiction may not constitutionally be exercised under either the federal or Illinois due process clauses if the defendant has had no contacts, ties, or relations with Illinois. *See International Shoe,* 326 U.S. at 319; *See also Asahi Metal Indus. v. Superior Ct.,* 480 U.S. 102, 109 (1987); *Helicopteros Nacionales de Columbia, S.A. v. Hall,* 466 U.S. 408, 414 (1984); *World-Wide Volkswagen,* 444 U.S. at 294. Illinois courts have held that before a court may exercise long-arm jurisdiction over a nonresident defendant, "there must be some act by which defendant purposefully availed herself of the privilege of conducting activities within the forum state, thereby invoking the benefits and protections of its laws." *Johnson,* 244 Ill. App. 3d at 388, 614 N.E.2d at 411, 185 Ill. Dec. at 277 (citing *World-Wide Volkswagen,* 444

U.S. at 297); *see Mors*, 791 F. Supp. at 742; *Alpert*, 235 Ill. App. 3d at 459, 601 N.E.2d at 1035, 176 Ill. Dec. at 337. Moreover, unless plaintiff proves that Charter's "conduct and connection with [Illinois] are such that [Charter] should reasonably anticipate being haled into court [here]," then jurisdiction cannot constitutionally be exercised under the long-arm statute. *World-Wide Volkswagen*, 444 U.S. at 297; *see also Asahi*, 480 U.S. at 115 (" '[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field' ") (quoting *United States v. First Nat'l City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting)). The focus of a court's inquiry regarding due process should be " 'the relationship among the defendant, the forum, and the litigation,' " and the main factor in the minimum contacts due process analysis is "foreseeability." *Mors*, 791 F. Supp. at 742 (citation omitted).

B. Section 2-208: General Jurisdiction Under The Illinois Personal Service Statute

Jurisdiction may also be established over a nonresident defendant pursuant to the Illinois Personal Service Statute, which provides in relevant part:

> § 2-208. Personal service outside State. (a) Personal service of summons may be made upon any party outside the State. If upon a citizen or resident of this State or upon a person who has *submitted to the jurisdiction of the courts of this State*, it shall have the force and effect of personal service of summons within this State; otherwise it shall have the force and effect of service by publication.

Ill. Code Civ. P. § 2-208 (West 1992) (emphasis added). This section has been interpreted by Illinois courts to confer personal jurisdiction over a defendant who has conducted business activities within the State unrelated to the cause of action only if such activities are "continuous and substantial." *Huffman v. Inland Oil & Transp. Co.*, 98 Ill. App. 3d 1010, 1016, 424 N.E.2d 1209, 1214, 54 Ill. Dec. 306, 311 (5th Dist. 1981);

See St. Louis-San Francisco Ry. v. Gitchoff, 68 Ill. 2d 38, 44, 369 N.E.2d 52, 54, 11 Ill. Dec. 598, 600 (1977). Under this analysis, also referred to as the "doing business" doctrine, a nonresident defendant is subject to jurisdiction in Illinois if the unrelated activities within the state occur " 'not occasionally or casually, but with a fair measure of permanence and continuity.' "[3] *R.W. Sawant*, 111 Ill. 2d at 313, 489 N.E.2d at 1365, 95 Ill. Dec. at 501 (citation omitted); *see also Heritage House Restaurants v. Continental Funding Group*, 906 F.2d 276, 283 (7th Cir. 1990) ("Contacts with the forum state that are 'random.' 'fortuitous,' or 'attenuated,' will not be sufficient to establish that exercise of that state's jurisdiction was foreseeable to the defendant."); *Rokeby-Johnson v. Derek Bryant Ins. Brokers*, 230 Ill. App. 3d 308, 318, 594 N.E.2d 1190, 1197, 171 Ill. Dec. 670, 677 (1st Dist. 1992) ("There is no all-inclusive test for determining what activity amounts to 'doing business,' however, the standard is quite high and requires a showing that the corporation is conducting business of such character and extent as to warrant an inference that the nonresident corporation has submitted to the jurisdiction and laws of the State.")

C. Charter Is Not Subject To *In Personam* Jurisdiction Under The Illinois Long-Arm Statute Or The Illinois Personal Service Statute

The assertion of personal jurisdiction over Charter would be inconsistent with the Illinois long-arm and personal service statutes, as well as federal and state due process, because Charter has not had the necessary "minimum contacts" with Illinois. Plaintiff's cause of action is based upon the defendants' alleged manufacture and distribution of asbestos and asbestos-containing products. Because Charter has never engaged in any aspect of the asbestos business, either in Illinois or anywhere else, (Thwaite Aff. ¶ 4), any contact

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[3] Section 2-209(b)(4) is the "doing business" prong under the Illinois long-arm statute.

Charter might have with Illinois would be unrelated to plaintiff's cause of action and therefore must satisfy the standards for general jurisdiction under Illinois' personal service statute. *R. W. Sawant,* 111 Ill. 2d at 313, 489 N.E.2d at 1365, 95 Ill. Dec. at 501. The personal service statute is not satisfied in this case because Charter has not had "continuous and systematic" contacts "with a fair measure of permanence and continuity" with the State. *Id.*

Indeed, the Thwaite Affidavit confirms that Charter has not committed *any* acts in the State of Illinois. (Thwaite Aff. ¶ 6). Charter has never been registered or qualified to do business in Illinois, and it has never maintained an office in Illinois. No director, officer, or employee of Charter has ever resided or conducted business in Illinois. Charter has never owned or leased real property, maintained a post office box or telephone, or advertised in the State of Illinois. Charter has never had a registered agent for service of process here, and it has never paid taxes or franchise fees or commenced a lawsuit in Illinois. (*Id.*)

Under these circumstances, the exercise of jurisdiction over Charter would offend all notions of " 'fair play and substantial justice.' " *Buxton,* 657 N.E.2d at 710, 212 Ill. Dec. at 509 (citation omitted). This is particularly true in Charter's case because Charter is the resident of a foreign country, and "[t]he unique burdens placed upon one who must defend oneself In a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *Asahi,* 480 U.S. at 114; *see also Buxton,* 657 N.E.2d at 710, 212 Ill. Dec. at 509 (noting that "inconvenience may at some point become so substantial as to achieve *constitutional* magnitude") (quoting *Burger King,* 471 U.S. at 483 n.26) (emphasis in original).

Hence, because Charter is a United Kingdom corporation which has never engaged in any aspect of the asbestos business, and because Charter has never done business and is not doing business in this forum, jurisdiction cannot constitutionally be asserted over Charter.

II. CHARTER IS NOT THE ALTER EGO OF CAPE OR OF CAPE'S SUBSIDIARIES

Plaintiff may contend that Charter is subject to jurisdiction on an *alter ego* theory by virtue of Charter's previous investment relationship with Cape. However, as numerous Illinois courts have held in previous litigation involving Charter, and as shown in the accompanying Thwaite Affidavit and the discussion below, the "corporate veil" of Cape and its subsidiaries cannot be pierced to hold Charter subject to jurisdiction in Illinois. Cape and its subsidiaries are completely separate and independent entities, and the corporate integrity of each of those companies has always been respected by Charter. Thus, this theory of jurisdiction would also be unavailing.

A. Illinois Courts Pierce The Corporate Veil Only Under Exceptional Circumstances

Under Illinois law, piercing the corporate veil is an extraordinary remedy to be granted only "in those exceptional circumstances where to adhere to the fiction [of separate corporate legal entities] would sanction a fraud or promote injustice." *B. Kreisman & Co. v. First Arlington Nat'l Bank of Arlington Heights*, 91 Ill. App. 3d 847, 850, 415 N.E.2d 1070, 1072, 47 Ill. Dec. 757, 759 (2d Dist. 1980). In fact, under Illinois law, in order to pierce the corporate veil a plaintiff must demonstrate that: (1) there is "such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist;" and, as stated, *supra*, that (2) adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice." *Alpert*, 235 Ill. App. 3d at 460, 601 N.E.2d at 1036, 176 Ill. Dec. at 388; *see also Great Lakes Overseas, Inc. v. Wah Kwong Shipping Group*, 990 F.2d 990, 996 (7th Cir. 1993). A plaintiff seeking to pierce the corporate veil has a heavy burden, then, because "[a] corporate entity will be disregarded and the veil of limited liability pierced" only where a fraud has been perpetrated, and to do otherwise "would . . . present an obstacle to the protection of private rights or where the corporation is merely the . . . business conduit of a governing or dominating personality." *Alpert,* 235 Ill. App. 3d at 460, 601 N.E.2d at 1036, 176 Ill. Dec. at 338. Thus, the fact that the subsidiary is wholly owned and shares officers with the parent are not alone a sufficient basis for exercising *in personam* jurisdiction over a parent where jurisdiction exists over the subsidiary. *Betar v. De Havilland Aircraft of Canada Ltd.,* 80 F.R.D. 400, 401 (N.D. Ill. 1977), *rev'd on other grounds,* 603 F.2d 30 (7th Cir. 1979), *cert. denied,* 444 U.S. 1098 (1980); *accord Graco, Inc. v. Kremlin, Inc.,* 558 F. Supp. 188, 191 n.3 (N.D. Ill. 1982) ("common directors and officers of a parent and its [wholly owned] subsidiary is not enough, by itself, to confer jurisdiction over a nonresident parent corporation"); *see also Main Bank of Chicago v. Baker,* 86 Ill. 2d 188, 204-05, 427 N.E.2d 94, 101, 56 Ill. Dec. 14, 21 (1981) (neither stock ownership nor common officers and directors alone creates an *alter ego* relationship, as "[t]hese practices are common and exist in most parent-subsidiary relationships"). Instead, the nature or degree of the dominance that must be shown in order for a subsidiary to be considered the *alter ego* or a "mere department" of its parent has been characterized as actual and pervasive "control" over the subsidiary's daily operations. *See Betar,* 80 F.R.D. at 401 ("[t]he maintenance of separate records, separate offices and a *Bona fide* business purpose" control a court's determination of whether the corporate structure is a "fiction").

The principle of corporate separateness is equally applicable to the issue of *in personam* jurisdiction. The United States Supreme Court has long recognized that the activities of a subsidiary do not subject a parent corporation to *in personam* jurisdiction in the state where the subsidiary is located. *Cannon Mfg. Co. v. Cudahy Packing Co.,* 267 U.S. 333, 336 (1925).[4] Moreover, overwhelming authority in

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[4] Under the *Cannon* doctrine, the legal distinction between affiliated corporations is respected where the "corporate separation [is] real [and] not pure fiction." 267 U.S. at 337. In *Cannon,* the Court noted that through

Illinois establishes that significant stock ownership and overlapping directors are not sufficient to subject a parent corporation to jurisdiction based on the subsidiary's contacts with Illinois. *E.g., Rae Prod. and Chemicals Corp. v. Koch Materials, Co.*, No. 93 C 4818, 1995 WL 715884 (N.D. Ill. Dec. 1, 1995) (court declined to exercise jurisdiction over parent, and the holding corporation which owned the parent, based on acts of wholly owned subsidiary within the forum); *Sportmart, Inc. v. Frisch*, 537 F. Supp. 1254 (N.D. Ill. 1982) (court declined to exercise jurisdiction over parent based on acts of subsidiary within the forum); *John O. Butler Co. v. Standard Oil Co.*, 365 F. Supp. 501, 503 (N.D. Ill. 1973) (same).

Rae Prod. and Chemicals Corp. is particularly instructive. Plaintiff in that action filed suit against Elf Aquitaine, Inc. ("Elf") and Elf Petroleum North America, Inc. ("Elf Petroleum"). Elf Petroleum was a holding company wholly owned by Elf. Plaintiff alleged injury based upon the activities of Elf-Asphalt, Inc. ("Elf-A"), an Illinois-based subsidiary wholly owned by Elf Petroleum. Neither Elf nor Elf Petroleum had any contacts with Illinois. In addition, ElfA, operated as a separate corporate entity from Elf and Elf Petroleum. Accordingly, the court concluded that the plaintiff had failed to make a *prima facie* showing of personal jurisdiction. The court noted in particular that, although Elf-A had a bank account which required an Elf signatory, this fact "does not by itself demonstrate that [Elf] makes the decisions as to what is done with this account," and plaintiff failed to allege

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complete ownership of the subsidiary's capital stock, the parent "exert[ed] its control both commercially and financially" and dominated the subsidiary "immediately and completely." *Id.* at 335. The subsidiary had been established solely to market the parent's products in North Carolina, a function performed in other states by unincorporated divisions of the parent company. Despite the extensive "control" by the parent over the subsidiary, the Court declined to pierce the corporate veil based on its finding that "[t]he existence of the [subsidiary] as a distinct corporate entity [was] in all respects observed." *Id.*

sufficient factors to demonstrate total domination of the subsidiary by the parent, or that the subsidiary was an "agent" of the parent. 1995 WL 715884, at *2-3.

In another case, *Sportmart, Inc.*, the court dismissed an antitrust complaint against an Italian corporation, Nordica di Franco Giovanni Vaccari & C.S.A.S. ("Nordica-Italy") and its wholly owned subsidiary, Nordica USA, Inc. ("Nordica-US"), for lack of personal jurisdiction, improper venue, and insufficient service of process. Plaintiff argued that Nordica-Italy transacted business in Illinois because it owned 34 percent of a domestic distributor, RNC, Inc. ("RNC"), which admittedly did business in Illinois, and because Nordica-Italy "controlled" RNC during the period covered by the complaint. It further contended that, because Nordica-Italy formed Nordica-US as a "continuation of the ongoing business of RNC with respect to the distribution of Nordica products," 537 F. Supp. at 1258, *alter ego* jurisdiction could be asserted over both Nordica entities. The court refused to exercise *alter ego* jurisdiction over Nordica-Italy based on RNC's sales in Illinois under the federal antitrust jurisdiction statute, notwithstanding that antitrust jurisdiction may be exercised more broadly than jurisdiction under the Illinois long-arm statute. *Id.* at 1256 n.3. This result was due to the separateness of the corporate entities:

> Although Nordica-Italy monitored RNC's financial records and performance activity, it did not participate in such operating decisions as reviewing sales policies and prices, warehousing, salaries and promotions, or collection of accounts receivable and inventory according to the second affidavit filed by Giovanni Vaccari, a director and officer of the Italian company. . . . Even a parent corporation, let alone a minority shareholder, is permitted to engage in "limited inter-organizational activities such as record reporting or monitoring" without destroying its corporate separateness for jurisdictional purposes. *Tiger Trash v. Browning-Ferris Indus.*, 560

> F.2d 818, 823 (7th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978).

Id. at 1259 n.7.

In *John O. Butler Co.*, the court, applying *Cannon*, declined to exercise jurisdiction over the parent corporation when the facts revealed that the parent and its subsidiary were separately incorporated and, while the directors overlapped, each board was distinct and included some members not found on the other entity's board. Board meetings were held separately, and separate minutes were kept. Each business had its own name and conducted its business under its own letterhead. The subsidiary had its own inventory and manufacturing facilities, a separate payroll, and each company paid its taxes separately. All transactions between the parent and its subsidiary were formally entered into separate ledgers and other corporate formalities were observed. 365 F. Supp. at 503. Under these circumstances, the court held that the *Cannon* test had been satisfied and that jurisdiction was lacking over the parent. *Id.*

Finally, under Illinois law, where a nonresident parent acquires shareholder control of an entity already engaged in an established business in the forum and remains passive with respect to the subsidiary's management, finances and operations, then the parent will not be regarded as the subsidiary's *alter ego*. Thus, in *Connelly v. Uniroyal, Inc.*, 55 Ill. App. 3d 530, 370 N.E.2d 1189, 13 Ill. Dec. 162 (1st Dist. 1977), *aff'd in part and rev'd in part*, 75 Ill. 2d 393, 389 N.E.2d 155, 27 Ill. Dec. 343 (1979), *cert. denied*, 444 U.S. 1060 (1980), the Illinois Court of Appeals refused to find a domestic parent vicariously liable for the tort of its foreign manufacturing subsidiary even though, at the time of the commission of the tort, the parent owned 95 percent of the subsidiary's stock, two of the subsidiary's directors were directors, officers or employees of the parent, and the product carried the parent's trademark. In concluding that the subsidiary was never operated as a "mere instrumentality" or "*alter ego*" of the parent, the court noted especially that the subsidiary had conducted the same business which had resulted in the plaintiffs injury "long before [the parent's] acquisition of its stock," and that the parent never participated in the manufacture of the subsidiary's products. *Id.* at 538-41, 370 N.E.2d at 1195-97, 13 Ill. Dec. at 168-70. The Illinois Supreme Court affirmed the finding with respect to the parent's non-liability. 75 Ill. 2d at 409, 389 N.E.2d at 162, 27 Ill. Dec. at 350.

The court's holding in *Connelly* is particularly applicable here because Cape existed as an independent company for over 70 years before Charter was formed. Moreover, as in *Connelly*, Charter has never participated in Cape's manufacture of products. The only contacts between Charter and Cape were Charter's shareholding interest in Cape and its nominees on Cape's Board of Directors. These contacts are insufficient to render Cape the *alter ego* of Charter, and therefore none of Cape's activities at any time can furnish a basis for this Court's exercise of *alter ego* jurisdiction over Charter.

B. Charter Is Not The Alter Ego Of Cape

An analysis of the relationship between Charter and Cape shows that Cape always has been operationally, financially, and commercially independent of Charter.[5] Thus:

(1) Charter and Cape are engaged in entirely different businesses, their operations are completely separate and they do business from separate offices. (Thwaite Aff. ¶ 17).

(2) All corporate formalities have been observed. (*Id.* ¶¶ 16-20).

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[5] Charter has had no connections of any kind with Cape's operating subsidiaries. (Thwaite Aff. ¶¶ 22-23). Accordingly, in order to prove that Charter is subject to jurisdiction in Illinois, plaintiffs must show (1) that Cape is the *alter ego* of one or more of its former asbestos subsidiaries and that one or more of those subsidiaries is subject to jurisdiction in Illinois, and (2) that Charter is the *alter ego* of Cape. For the purposes of this motion only, Charter assumes *arguendo* that a former asbestos subsidiary of Cape is subject to jurisdiction in Illinois and that subsidiary was the *alter ego* of Cape.

(3) Cape was not incorporated by Charter, and is adequately and independently capitalized. (*Id.* ¶¶ 10, 11, 19).

(4) Charter and Cape never had officers or directors in common other than Charter's minority, non-executive representation on Cape's Board (which ceased as of July 18, 1996), and Cape's Board and management are independent of Charter. (*Id.* ¶¶ 14-16).

(5) Charter has never sought a common corporate identification with Cape. (*Id.* ¶ 20).

(6) Cape and its subsidiaries have never been treated as divisions or "departments" of Charter. (*Id.* ¶¶ 16-20).

(7) Charter has never been involved in the day-to-day management or the business affairs of Cape, and Charter does not pay Cape's operating expenses. (*Id.* ¶¶ 19-20).

(8) Charter has not shared financial or accounting facilities with Cape. (*Id.* ¶¶ 18-19).

(9) As of July 18, 1996, Charter sold all of its Cape shares, and Charter currently has no investment or other relationship with Cape. (*Id.* ¶ 13).

See Graco, 558 F. Supp. at 191 (citing *alter ego* factors). On the basis of these facts, plaintiff cannot sustain her burden of establishing that Cape is a "mere department" of Charter or that Charter exercises actual and pervasive control over Cape's day-to-day operations. *Betar*, 80 F.R.D. at 401. Moreover, there is absolutely no evidence in this case that Charter abused the corporate form to perpetrate a fraud or injustice, as is required by Illinois law. *Alpert*, 235 Ill. App. 3d at 460, 601 N.E.2d at 1036, 176 Ill. Dec. at 338.

In sum, there is no basis for piercing the corporate veil of Cape to exercise jurisdiction over Charter. Indeed, numerous Illinois courts have determined in the context of previous asbestos litigation against Charter that Charter is not the *alter ego* of Cape. For example, in *Kessinger v. North American*

Asbestos Corp., No. 87-L-120 (11th Cir. McLean County, Ill. Dec. 1, 1988), the court found that Charter was not the *alter ego* of Cape for jurisdiction purposes. (A copy of the court's decision is attached hereto as Exhibit B). In *Mohn v. International Vermiculite Co.*, No. 85-L-16 (7th Cir. Macoupin County, Ill. Oct. 25, 1985), *aff'd*, 147 Ill. App. 3d 717, 498 N.E.2d 375, 101 Ill. Dec. 193 (4th Dist. 1986), *appeal denied*, 106 Ill. Dec. 49, 505 N.E.2d 355 (1987), the Appellate Court for the Fourth District of Illinois affirmed a lower court decision granting Charter's motion to dismiss for lack of personal jurisdiction. (A copy of the court's decision is attached hereto as Exhibit C). Moreover, the Circuit Court of the Eleventh Judicial Circuit granted Charter's motions to dismiss the complaints in three asbestos-related actions, finding that jurisdiction did not exist over Charter based upon Cape's alleged activities within the forum. *Wehmeier v. UNR Indus.*, No. 82-L-80 (11th Cir. McLean County, Ill. Nov. 27, 1985); *Gowen v. Unarco Indus.*, No. 83-L-140 (11th Cir. McLean County, Ill. Nov. 27, 1985); *Lafever v. Unarco Indus.*, No. 84-L-224 (11th Cir. McLean County, Ill. Nov. 27, 1985). (A copy of the court's decision is attached hereto as Exhibit D).

Outside of Illinois, every court to have finally resolved the issue has confirmed that Cape is a completely separate and independent company from Charter, and that the only relationship that has ever existed between Charter and Cape is that of an investor to an investment. *See, e.g.*, *Culbreth v. Amosa (PTY) Ltd.*, 898 F.2d 13, 14-15 (3d Cir. 1990) (Charter does not control Cape) (a copy of which is attached hereto as Exhibit E); *Craig v. Lake Asbestos of Quebec, Ltd.*, 843 F.2d 145, 152 (3d Cir. 1988) ("there is no evidence that Charter's intrusion into Cape's affairs is even 'constant' or day-to day") (a copy of which is attached hereto as Exhibit F); *Dillman v. Celotex*, No. A87-599 Civil (D. Alaska Aug. 22, 1988) (same, applying Alaska law) (a copy of which is attached hereto as Exhibit G); *In re Asbestos Litig. Venued in Middlesex Co.*, No. L-37243-79, slip op. at 34 (N.J. Super. Ct. July 10, 1987)

("Cape's management historically has been fiercely independent and has deliberately maintained an arms-length relationship with Charter") (a copy of which is attached hereto as Exhibit H).[6]

Accordingly, there is nothing in the relationship between Charter and Cape that would justify piercing the corporate veil to exercise jurisdiction over Charter. Cape and its subsidiaries have always been financed, managed, and operated independently of Charter. Neither Cape nor any of its subsidiaries has ever been so dominated by Charter that it has been a "mere department" of Charter, with no separate mind, will, or existence of its own. Indeed, the only relationship that has ever existed between Charter and Cape is that of an investor to an investment. Without more, that relationship is insufficient to support a finding that Cape is the *alter ego* of Charter. Thus, Charter cannot be subjected to *in personam* jurisdiction in Illinois based on the acts of Cape or Cape's subsidiaries.

III. THIS COURT MAY NOT EXERCISE *IN PERSONAM* JURISDICTION OVER CHARTER BASED UPON THE ACTIVITIES OF ALLEGED CO-CONSPIRATORS

In previous submissions to this Court, plaintiff has contended that jurisdiction may be asserted against Charter based upon the allegation in the complaint that Charter and other defendants conspired to withhold from workers pertinent information relating to the hazards of asbestos. These allegations of conspiracy, however, are an insufficient basis for the exercise of personal jurisdiction over Charter because (1) on their face, they do not properly allege that Charter engaged in a conspiracy; (2) plaintiff has made no showing that the other alleged co-conspirators were Charter's "agents," which is necessary in order to obtain jurisdiction over Charter under a conspiracy theory; and (3) obtaining personal jurisdiction over Charter through bare allegations of a conspiracy violates due process.

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[6] One court, the Circuit Court for Jones County, Mississippi, recently denied Charter's motion to dismiss for lack of personal jurisdiction. The substance of the court's decision consisted of a single sentence, which found no facts and applied the incorrect legal standard. Another court in Mississippi previously determined that Charter was not the *alter ego* of Cape for jurisdictional purposes. *A.J. Adams, et al. v. A. W. Chesterton, et al.*, No. 251-95-905 CIV (Cir. Ct. Hinds County, 1st Judicial District) (copy attached as Exhibit I). Other decisions in Illinois and other states holding that Charter is not the *alter ego* of Cape are attached as Exhibit J.

A. Plaintiff Fails To Allege A Conspiracy Involving Charter.

The notion of a conspiracy-based theory of jurisdiction has been criticized by courts construing Illinois law. *See Chromium Indus. v. Mirror Polishing & Plating Co.*, 448 F. Supp. 544, 552 (N.D. Ill. 1978); *Davis v. A & J Elecs.*, 792 F.2d 74, 76 (7th Cir. 1986). Nevertheless, in *Green v. Advance Ross Elecs. Com.*, 86 Ill. 2d 431, 440-41, 427 N.E.2d 1203, 1208, 56 Ill. Dec. 657, 662 (1981), the Illinois Supreme Court accepted such a theory, subject to several important limitations.

In order to successfully plead a conspiracy theory of jurisdiction in Illinois, a plaintiff must demonstrate (1) the existence of an actionable conspiracy; and (2) a substantial act in furtherance of the conspiracy performed in the forum state by one of the conspirators. *Textor v. Board of Regents of N. Ill. Univ.*, 711 F.2d 1387, 1392-93 (7th Cir. 1983). In order to assert jurisdiction over a defendant who did not itself have contacts with the forum state, the act in the forum state must have been committed by a co-conspirator acting as that defendant's agent. *Green*, 86 Ill. 2d at 441, 427 N.E.2d at 1208, 56 Ill. Dec. at 662.

An allegation of conspiracy for jurisdictional purposes requires the plaintiff to allege detailed facts that the conspiracy existed.[7] "[T]he bare allegation of the existence of a conspiracy does not constitute an actionable wrong upon which liability for damages may be found." *Hume & Liechty Veterinary Assocs. v. Hodes*, 259 Ill. App. 3d 367, 369, 632 N.E.2d 46, 48, 197 Ill. Dec. 977, 979 (1st Dist. 1994); *see Dymek v. Nyquist*, 128 Ill. App. 3d 859, 469 N.E.2d 659, 83 Ill. Dec. 52 (1st Dist. 1984) ("ultimate facts must be pled" by a plaintiff alleging conspiracy). In addition, "[i]t is not true that if one conspirator is subject to Illinois jurisdiction so are all the others." *Green*, 86 Ill. 2d at 440, 427 N.E.2d at 1208, 56 Ill. Dec. at 662. Indeed, the Northern District of Illinois, applying the Illinois long-arm statute, recently held that:

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[7] That a conspiracy must be pleaded with particularity in order to establish jurisdiction is consistent with the general rule that "[t]he factual

> The cases are unanimous that a bare allegation of conspiracy between the defendant and a person within the personal jurisdiction of the court is not enough. Otherwise plaintiffs could drag defendants to remote forums for protracted proceedings even though there were grave reasons for questioning whether the defendant was [actually] suable in those forums.

Ahmed v. Quinn, No. 95 C 6673, 1996 WL 388418, at *4 (N.D. Ill. July 9, 1996) (quoting *Stauffacher v. Bennett*, 969 F.2d 455, 460 (7th Cir. 1992) (applying the Wisconsin long-arm statute)). The *Ahmed* court found that plaintiff failed to allege facts sufficient to find jurisdiction over the defendant based on an unsubstantiated allegation of conspiracy.

Herein, the conspiracy allegations against Charter are wholly conclusory. (*See* Complaint, Count 10, ¶ 15). The complaint fails to allege a single fact linking Charter to any

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basis for assertion and existence of jurisdiction over the person of a nonresident defendant depends upon the allegations of facts in the complaint before th[is] court." *First Nat'l Bank of Chicago v. Screen Gems, Inc.*, 40 Ill. App. 3d 427, 433, 352 N.E.2d 285, 290 (1st Dist. 1976). Failure to include allegations of a nonresident corporation's acts upon which an Illinois court can base jurisdiction is fatal to a complaint. *Reeves v. Baltimore & Ohio R.R. Co.*, 171 Ill. App. 3d 1021, 526 N.E.2d 404, 122 Ill. Dec. 145 (1st Dist. 1988); *see also Heller Fin. v. Conagra, Inc.*, 166 Ill. App. 3d 1, 520 N.E.2d 922, 117 Ill. Dec. 571 (1st Dist. 1988).

conspiracy. Indeed, plaintiff's conspiracy allegations may in fact be designed to mislead the Court. The conspiracy counts first name seven defendants, including Charter. Only four of those defendants, however, are designated as "Co-Conspirators." (Complaint at 11-12). Charter is *not* included in that group. (*Id.*). Plaintiff then proceeds to lump together "Defendants and Co-Conspirators" in allegations concerning their knowledge of the hazards of asbestos and the effect that general knowledge of those dangers would have had on the asbestos industry. No facts are alleged which suggest that Charter in particular had any knowledge of the alleged conspiracy. Thus, the conspiracy allegations fail on their face to establish personal jurisdiction over Charter.

The courts' analyses in *Alpert, supra,* and *Kutner v. DeMassa,* 96 Ill. App. 3d 243, 421 N.E.2d 231, 51 Ill. Dec. 723 (1st Dist. 1981), are particularly relevant to plaintiff's conspiracy theory. In both cases, jurisdiction hinged upon the defendants' participation with "conspiracies." In both cases, the plaintiff submitted affidavits which made vague, unsubstantiated conspiracy allegations. Specifically, in *Kutner*, plaintiff merely alleged, in conclusory fashion, that certain co-conspirators. acting as defendant's agents, perpetrated a tort within the forum. 96 Ill. App. 3d at 243-45, 248, 421 N.E.2d at 232-33, 235, 51 Ill. Dec. at 724-25, 727. Plaintiff failed to plead any facts which demonstrated that an agency relationship existed between the alleged co-conspirators and the defendant, or that the defendant "agreed, schemed, or conspired" to injure the plaintiff. In contrast, the defendant submitted an affidavit in direct contradiction of the plaintiff's conspiracy allegations. "If a defendant's affidavit contesting jurisdiction is not refuted by a counter-affidavit filed by the plaintiff, [who has the burden of proving jurisdiction, then] the facts alleged in the defendant's affidavit are accepted as true." *Id.* Accordingly, based upon the plaintiff's vague assertion of conspiracy, the court denied jurisdiction over the defendants. *Id.* at 249, 421 N.E.2d at 236, 51 Ill. Dec. at 728. The court in *Alpert* reached the same conclusion where the defendants, in response to charges of conspiracy in a defamation claim, submitted affidavits specifically denying making the alleged defamatory statements. 235 Ill. App. 3d at 463, 601 N.E.2d at 1038, 176 Ill. Dec. at 340.

Herein, plaintiff has failed to demonstrate any agreement or scheme between the Charter and the other defendants. Instead, as it stands, the plain language of the complaint, which is devoid of any substantive facts and which does not include Charter in the group of "co-conspirators," leads to the inevitable conclusion that plaintiff has not even alleged that Charter participated in a conspiracy. Therefore, plaintiff cannot purport to invoke this Court's long-arm jurisdiction based on a conspiracy theory.[8]

B. Plaintiff Fails To Allege An Agency Relationship Between Charter And The *Alleged* "Co-Conspirators"

The underlying rationale of the conspiracy theory of jurisdiction under Illinois law is that the "co-conspirators are each others' agents." *Green*, 86 Ill. 2d at 441, 427 N.E.2d at 1208, 56 Ill. Dec. at 662; *see also* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1069, at 410-11 (2d ed. 1987). Consequently, it has been found that the Illinois long-arm statute "permits the exercise of personal jurisdiction over a party to a civil conspiracy if a co-conspirator acts within Illinois *as the party's agent.*" *Davis*, 792 F.2d at 76 (emphasis added).

Thus, "[j]urisdiction over a corporation simply does not translate into jurisdiction over those with whom it may have common interests." *Knorr Brake Corp. v. Harbil, Inc.*, 550 F. Supp. 476, 479 (N.D. Ill. 1982). Moreover, the mere existence of a parent-subsidiary relationship, as exists between Charter and Cape, is insufficient by itself to support the exercise of jurisdiction over a parent corporation without the proper contacts with the forum. *Wissmiller v. Lincoln Trail Motosports*, 195 Ill. App. 3d 399, 403, 552 N.E.2d 295, 298, 141 Ill. Dec.

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[8] Charter is not asking this Court to rule on the legal sufficiency of plaintiff's pleading. Because Charter is challenging this Court's jurisdiction, Charter cannot at this point seek such a substantive ruling.

927, 930 (4th Dist. 1990); *In re Schwinn Bicycle Co.*, 192 B.R. 461, 476 (Bankr. N.D. Ill. 1996) ("Even existence of a parent-subsidiary relationship is not sufficient to make the subsidiary the parent's agent for jurisdictional purposes."); *(see also* Argument, *supra,* Section II at 14-23). Hence, in order to obtain jurisdiction over Charter under a conspiracy theory of jurisdiction, in addition to pleading an actionable conspiracy, plaintiff herein must also demonstrate that an agency relationship existed between Charter and one of the named defendants or co-conspirators. *See Green*, 86 Ill. 2d at 440-41, 427 N.E.2d at 1208, 56 Ill. Dec. at 662 (court declined to exercise jurisdiction over a nonresident defendant based upon conspiracy where plaintiff failed to plead that the named "co-conspirator" had acted as the defendant's "agent"); *Damian Servs. Corp. v. PLC Servs., Inc.*, 763 F. Supp. 369, 372-73 (N.D. Ill. 1991) (same).

To demonstrate agency, a plaintiff must allege sufficient indicia of an agency relationship – i.e., whether intent existed to create an agency relationship; whether the agent acted for the benefit of the principal; and, finally, whether the agent was under the control of the principal. *See generally* HAROLD GILL REUSCHLEIN & WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP §§ 3-5, at 11-13 (2d ed. 1990). Herein, plaintiff has failed to allege either an intent to create an agency relationship, or control of an alleged "agent" by Charter. For example, plaintiff has failed to allege that any of the named defendants or co-conspirators acted under authority from Charter. "An agent's authority can be either actual or apparent, with circumstantial evidence used to establish the existence and extent of the authority." *Damian Servs. Corp.*, 763 F. Supp. at 372. Where authority is not obvious, apparent authority of an agent may exist where a principal, "through his words or conduct, creates a reasonable impression that the agent has been granted authority to perform certain acts." *Id.* This may be demonstrated upon the acts or statements of the principal. *Id.* at 372-73. Plaintiff has failed to plead that *any* of the named defendants or co-defendants were acting under Charter's authority, or for Charter's benefit. Clearly, then, plaintiff has failed sufficiently to plead a conspiracy theory of jurisdiction over Charter, and the case should be dismissed.

C. The Exercise Of Jurisdiction Over Charter Based Upon Plaintiff's Bare *Allegations* Of Conspiracy Would Be Inconsistent With Due Process

The exercise of jurisdiction over Charter based upon the facts alleged in the plaintiff's complaint would be inconsistent with due process. In general, as a theory of personal jurisdiction, jurisdiction based upon a conspiracy has been criticized for due process concerns, as well as for merging "the jurisdictional issue with the merits." *Stauffacher,* 969 F.2d at 459; *see generally* Ann Althouse, *The Use of Conspiracy Theory to Establish In Personam Jurisdiction: A Due Process Analysis,* 52 FORDHAM L. REV. 234, 251-54 (1983).[9] This is because the question of personal jurisdiction is distinct from the question of substantive liability. *Bell v. Hood,* 327 U.S. 678, 682 (1946); *Stauffacher,* 969 F.2d at 460. In addition, as demonstrated *supra,* due process under both the federal and state due process clauses requires the foreseeability of being hailed into court in the foreign forum. (*See* Argument, *supra,* Section I at 9-11). Thus, to be consistent with due process, "[t]he facts of each case must always be weighed in determining whether personal jurisdiction would comport with fair play and substantial justice." *Buxton,* 657 N.E.2d at 710, 212 Ill. Dec. at 509. For the reasons stated above, the exercise of jurisdiction over Charter would be fundamentally unfair.

In sum, plaintiff has failed to demonstrate that Charter committed any act in Illinois, that Charter purposefully availed itself of the benefits of Illinois, or that Charter did anything from which it could reasonably anticipate being haled into court in Illinois. Furthermore, plaintiffs' contention that Charter participated in a conspiracy with other named defendants also fails, as there is no allegation that Charter acted in concert with Cape or any of the other named defendants as to the mining, advertising or distribution of asbestos in Illinois, or that any of the named defendants or co-conspirators acted as an agent of Charter within the alleged "conspiracy." Accordingly, Charter has not had any jurisdictional contacts with Illinois, Charter is not the *alter ego* of Cape, Charter is not part of any conspiracy related to Illinois, and, thus, there is no basis for jurisdiction to be exercised over Charter by this Court.

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[9] This theory also runs afoul of the well-settled principle that jurisdictional contacts must be measured with respect to each particular defendant, and may not be assessed based on another defendant's activities. *E.g., Rush v Savchuk,* 444 U.S. 320 (1980).

Conclusion

For the foregoing reasons, the Complaint should be dismissed as against Charter for lack of *in personam* jurisdiction.

Dated: Chicago, Illinois
November 13, 1996

Respectfully submitted,

WILDMAN, HARROLD, ALLEN & DIXON

By: /s/ David M. Simon
On of the Attorneys
for Defendant Charter plc

John E. Frey
David Simon
Wildman, Harrold Allen & Dixon
225 Wacker Drive
Chicago, Illinois 60606-1229
(312) 201-2000

Of Counsel:
Werner Polak, Esq.
Stephen Fisbein, Esq.
Edwina F. Martin, Esq.
SHEARMAN & STERLING
Citicorp Center
153 East 53rd Street
New York, New York 10022
(212) 848-4000

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT
COUNTY OF McLEAN

ELEANOR PRICE, Individually and as Special Administrator of the Estate of Floyd Price, deceased,	)	
Plaintiff,	)	**No.: 95 L 50**
vs.	)	
UNARCO INDUSTRIES, INC., et al.,	)	**(Filed Nov. 14, 1996)**
Defendants.	)	

CHARTER PLC'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

Pursuant to its special and limited appearance and 735 ILCS 5/2-301, defendant Charter plc respectfully moves the Court to dismiss the complaint against defendant Charter plc for lack of jurisdiction over defendant Charter plc. A memorandum in support is attached hereto.

Wherefore, defendant Charter plc respectfully requests that the Court enter an order pursuant to 735 ILCS 5/2-301 dismissing the complaint against defendant Charter plc for lack of jurisdiction over defendant Charter plc.

Respectfully submitted,

Charter plc

By: /s/ David Simon
One of its attorneys

John E. Frey
David M. Simon
Wildman, Harrold, Allen & Dixon
225 West Wacker Drive
Chicago, Illinois 60606
(312) 201-2000

IN THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT
McLEAN COUNTY, ILLINOIS

ELEANOR PRICE, Individually and as Special Administrator of the Estate of Floyd Price, deceased, Plaintiff, v. UNARCO INDUSTRIES, INC., ET AL., Defendants.	NO. 95-L-50

MEMORANDUM OF DEFENDANT CHARTER CONSOLIDATED P.L.C. IN SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT FOR LACK OF PERSONAL JURISDICTION

WILDMAN, HARROLD, ALLEN & DIXON

225 West Wacker Drive
Chicago, Illinois 60606-1229
Telephone: (312) 201-2000
Facsimile: (312) 201-2555

COUNSEL FOR CHARTER CONSOLIDATED P.L.C.

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Preliminary Statement

Charter Consolidated P.L.C. ("Charter") submits this memorandum in support of its motion, pursuant to section 2-301 of the Illinois Code of Civil Procedure, to dismiss plaintiffs Complaint (the "Complaint") for lack of *in personam* jurisdiction.

Plaintiff commenced this action to recover damages for injuries allegedly suffered as a result of exposure to asbestos and asbestos-containing materials supplied by the named defendants. (Complaint, ¶¶ 23-27). The Complaint fails, however, to establish any basis for the exercise of *in personam* jurisdiction over Charter.

First, Charter is a United Kingdom company which has never engaged in any aspect of the asbestos business and which has never done any business in Illinois. Charter thus has not had any contacts with this State that would subject it to the Court's jurisdiction pursuant to the terms of the Illinois long-arm and personal service statutes and the requirements of the due process clauses of the Fourteenth Amendment and the Illinois Constitution.

Second, while plaintiff may contend that alleged asbestos-related activities of subsidiaries of Cape P.L.C. ("Cape") are attributable to Charter, this theory of jurisdiction also would be unavailing. The accompanying affidavit of Peter M. Thwaite (hereinafter, the "Thwaite Aff.," attached hereto as Exhibit A) confirms that Cape-formerly a partially owned, publicly held subsidiary of Charter is an independent company and that Charter has never controlled any aspect of Cape's or its subsidiaries' businesses. As of July 18, 1996, Charter disposed of its entire shareholding in Cape and since that time, Charter has had no interest in Cape whatsoever. Similar *"alter ego"* allegations have been made unsuccessfully in other asbestos-related actions filed against Charter. However, every court to have finally resolved the issue, including numerous Illinois courts, has held as a matter of fact and law that Charter is not the *alter ego* of Cape.

Finally, plaintiff's allegation that Charter and other named defendants participated in a conspiracy to withhold pertinent information from plaintiff regarding the health hazards and dangers posed by asbestos, (Complaint at 12-14), is insufficient to establish personal jurisdiction over Charter. Conspiracy is a theory of liability, not a theory of personal jurisdiction. To the extent some courts have, under limited circumstances, asserted jurisdiction based on a defendant's participation in a conspiracy, the plaintiff has been required to allege specific jurisdictional facts which are entirely absent from the complaint in this case.

Statement Of Facts

A. Charter And Its Business

Charter is an investment holding company, incorporated in 1964 under the laws of the United Kingdom as Charter Consolidated P.L.C. In 1993, Charter plc was formed and acquired all of the shares of Charter Consolidated P.L.C.[1] Charter plc is publicly held and its shares are traded on the London Stock Exchange. Its place of business is 7 Hobart Place, London, England. Charter and its wholly owned subsidiaries at its headquarters have 41 employees. (Thwaite Aff. ¶¶ 7-8).

1. Charter has had no contacts with Illinois

Charter has had no contacts with Illinois that could subject it to *in personam* jurisdiction in this State. Charter has never been registered or qualified to do business in Illinois, and it has never maintained an office in Illinois. No director, officer, or employee of Charter has ever resided or conducted business in Illinois. Charter has never owned or leased real property, maintained a post office box or telephone, or advertised in the State of Illinois. Charter has never had a registered agent for service of process here, and it has never paid taxes or franchise fees or commenced a lawsuit in Illinois. (*Id.* ¶ 6).

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[1] For convenience, defendant Charter Consolidated P.L.C and its successor, Charter plc, will be referred to collectively as "Charter" unless individually identified.

2. Charter has never engaged in the asbestos business

Charter has never engaged in any aspect of the asbestos business. It has never mined, manufactured, distributed, supplied or sold asbestos or asbestos-containing products in the United States or anywhere else. (*Id.* ¶ 4).

B. Cape P.L.C.

Cape is a holding company which was incorporated in 1893 under the laws of the United Kingdom. Cape is publicly held, and its stock is traded on the London Stock Exchange. Cape's principal place of business is Cape House, Iver Lane, Uxbridge, Middlesex, England. Cape owns shares of stock in companies engaged in, among other things, industrial contracting and the manufacturing of building products. (*Id.* ¶ 10).

Until June 1979, Cape indirectly owned companies that mined and marketed asbestos. The assets and/or shares of those companies were sold in June 1979 to a company unaffiliated with Cape or Charter. Since that time, Cape has neither directly nor indirectly engaged in the mining or marketing of asbestos. (*Id.*).

C. Charter's Investment Relationship With Cape

Cape had been a going concern for more than 70 years before Charter acquired an interest in it. Charter first acquired an indirect interest in Cape through one of three companies that Charter acquired in 1965, The Central Mining and Investment Corporation Limited ("CMIC"). At that time, CMIC indirectly owned 16.86 percent of Cape through its subsidiary, Central Mining Finance Limited. (*Id.* ¶ 11).

From 1965 to 1969, Charter's interest in Cape increased to 25 percent through occasional open-market purchases by its wholly owned investment subsidiaries. In May 1969, Charter made a tender offer for 50 percent of the outstanding Cape shares not already owned by Charter's subsidiaries. As a result of this tender offer, Charter's interest, through its investment subsidiaries, increased to 62.5 percent in 1969. From 1969 to 1978, through open-market purchases and as an underwriter of issues of Cape stock, Charter's interest in Cape fluctuated, gradually increasing to 67.3 percent. In 1982, Charter Consolidated Investments Ltd. ("CCI"), a wholly owned subsidiary of Charter, acquired all the Cape shares held by CMF and became the only Charter subsidiary to hold Cape shares. Thereafter, Charter's holdings, through CCI, varied slightly because of the conversion of convertible preference shares. (*Id.* ¶ 12).

Effective as of July 18, 1996, Charter sold all of its Cape shares, which then amounted to 65.3 percent of Cape. Since that date, Charter has held no Cape shares and Charter has had no investment or other relationship with Cape. (*Id.* ¶ 13).

D. The Separate Finances, Policies, And Practices Of Charter And Cape

Because the businesses of Charter and Cape are completely different, all aspects of their operations have always been separate. The offices and facilities of Cape always have been completely separate from those of Charter, and Cape always has maintained a head office in a different location from that of Charter. Cape always has maintained separate bank accounts and kept separate books and records at separate locations from those of Charter. (*Id.* ¶ 17). Until Charter disposed of its Cape shares this year, Charter was required by the law of the United Kingdom to consolidate Cape's earnings with its own for accounting purposes; nevertheless, each company had separate, independent auditors until 1993, and each company always issued its own financial statements to its shareholders. (*Id.* ¶ 18).

The Board of Directors of Cape always has met on a regular basis. Meetings of Cape's Board always have been held at different times and at separate locations from the Boards of Charter Consolidated P.L.C. and Charter plc. (*Id.* ¶ 16).

From 1965 to 1969, Charter nominated two non-executive directors to Cape's Board. During that time the number of directors on Cape's Board varied from eleven to fourteen. After the 1969 tender offer, Charter nominated three non-executive directors to Cape's Board, which has consisted of seven to thirteen directors for most of the years since 1969. (*Id.* ¶ 14). None of Charter's nominees, and no Charter personnel, has ever served as an officer of Cape or assumed managerial responsibilities for Cape's operations. When Charter sold its Cape shares in July 1996, all three Charter nominees on Cape's Board resigned and Charter has had no representation on Cape's Board since that time. (*Id.*).

After the 1969 tender offer, Charter invited the then Managing Director and Chairman of Cape to join Charter Consolidated P.L.C.'s Board, and he did so. He left Charter Consolidated P.L.C.'s Board in 1979; since 1980, no member of Cape's management has been on any Charter Board. The number of directors on the Board of Charter Consolidated P.L.C. has varied from ten to twenty until 1993, when Charter reorganized, and Charter plc presently has eight directors (Charter Consolidated P.L.C. has four directors). (*Id.* ¶ 15). Meetings of Charter's and Cape's shareholders are now and always have been held separately from one another. (*Id.* ¶ 16).

Cape always has been separately capitalized and always has paid its own operating expenses. Cape has never borrowed funds from Charter, and Charter has never guaranteed a loan to Cape. (*Id.* ¶ 19).

Cape's management is completely independent of that of Charter. Charter has never participated in the management or day-to-day business decisions or operations of Cape. Nor has Charter ever participated in any decisions by Cape or Cape's subsidiaries regarding any aspect of the asbestos business. (*Id.* ¶ 20-22). Charter has never employed the name or trademarks of Cape, and Cape has never made use of the name or trademarks of Charter. (*Id.* ¶ 20).[2]

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[2] All statements herein regarding Charter's relationship with Cape are equally true with respect to Charter's relationship with Cape's subsidiaries.

ARGUMENT

I. THIS COURT MAY NOT EXERCISE *IN PERSONAM* JURISDICTION OVER CHARTER BASED ON ITS OWN ACTIVITIES

This Court may exercise *in personam* jurisdiction over Charter based on Charter's contacts (if any) with Illinois only if plaintiff proves (i) that Charter has had jurisdiction-conferring contacts with this forum within the meaning of the Illinois long-arm statute, section 2-209 of the Illinois Code of Civil Procedure, or (ii) that Charter "has submitted to the jurisdiction of the Courts" of Illinois and is therefore subject to service of process pursuant to this State's personal service statute, section 2-208 of the Illinois Code of Civil Procedure. The exercise of personal jurisdiction under either of the Illinois statutes must also be consistent with the requirements of due process under both the Constitution of the United States and the Illinois Constitution.

A. Section 2-209: The Illinois Long-Arm Statute

The Illinois long-arm statute provides, in pertinent part, as follows:

> § 2-209. Act submitting to jurisdiction – Process. (a) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, his or her personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of such acts:
>
> (1) The transaction of any business within this State;
>
> (2) The commission of a tortious act within this State;

As the Thwaite Affidavit demonstrates, Cape's subsidiaries are completely independent of Charter. (Thwaite Aff. ¶¶ 22-23).

> (3) The ownership, use, or possession of any real estate situated in this State;
>
> * * *
>
> (c) A court may also exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States.

Ill. Code Civ. P. § 2-209 (West 1992).

Plaintiff has the burden of establishing long-arm jurisdiction over Charter. *R.W. Sawant & Co. v. Allied Programs Corp.*, 111 Ill. 2d 304, 310, 489 N.E.2d 1360, 1363, 95 Ill. Dec. 496, 499 (1986); *Alpert v. Bertsch*, 235 Ill. App. 3d 452, 458, 601 N.E.2d 1031, 1035, 176 Ill. Dec. 333, 337 (1st Dist. 1992); *Bobka v. Cook County Hosp.*, 117 Ill. App. 3d 359, 360, 453 N.E.2d 828, 829, 73 Ill. Dec. 3, 4 (1st Dist. 1983). This Court may not exercise *in personam* jurisdiction over Charter pursuant to the long-arm statute unless: (1) the non-resident had "minimum contacts" with the forum state such that he had "fair warning" that he may be required to defend himself there; (2) the action arose out of or relates to defendant's contacts with the forum; and (3) it is reasonable to require the defendant to litigate in the forum state. *Ores v. Kennedy*, 218 Ill. App. 3d 866, 872, 578 N.E.2d 1139, 1144, 161 Ill. Dec. 493, 498 (1st Dist. 1991); *Johnson v. Ortiz*, 244 Ill. App. 3d 384, 388, 614 N.E.2d 408, 411, 185 Ill. Dec. 274, 277 (1st Dist. 1993).

The exercise of jurisdiction under the long-arm statute must also satisfy the requirements of the due process clause of the Fourteenth Amendment. *FMC Corp. v. Varonos*, 892 F.2d 1308, 1310 n.5 (7th Cir. 1990); *Johnson*, 244 Ill. App. 3d at 389, 614 N.E.2d at 411-12, 185 Ill. Dec. at 277-78. In addition to the federal minimum due process requirements, Illinois courts require that the exercise of jurisdiction over a non-resident defendant comport with "the Illinois Constitution, which contains its own separate and independent guarantee of due process." *Mors v. Williams*, 791 F. Supp. 739, 741 (N.D. Ill. 1992); *see also Rollins v. Ellwood*, 141 Ill. 2d 244, 275, 565 N.E.2d 1302, 1316, 152 Ill. Dec. 384, 398 (1990) (the Illinois Constitution's guarantee of due process "stands separate and independent from the Federal guarantee of due process").

"The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980). Thus, in order to satisfy the due process standard, which is a necessary element of long-arm jurisdiction, plaintiff must show that Charter has "certain minimum contacts" with Illinois such that "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citation omitted); *Buxton v. Wyland Galleries Hawaii*, 657 N.E.2d 708, 710, 212 Ill. Dec. 507, 509 (4th Dist. 1995) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 476-77 (1985)); *Mors*, 791 F. Supp. at 741. Moreover, under the Illinois Constitution, "jurisdiction is to be asserted 'only when it is fair, just, and reasonable to require a nonresident defendant to defend an action in Illinois, considering the quality and nature of the defendant's acts which occur in Illinois or which affect interests located in Illinois.' " *Mors*, 791 F. Supp. at 743 (quoting *Rollins*, 141 Ill. 2d at 275, 565 N.E.2d at 1316, 152 Ill. Dec. at 398); Ill. Const. of 1970, art. 1, § 2 (West 1983).

In persona jurisdiction may not constitutionally be exercised under either the federal or Illinois due process clauses if the defendant has had no contacts, ties, or relations with Illinois. *See International Shoe*, 326 U.S. at 319; *see also Asahi Metal Indus. v. Superior Ct.*, 480 U.S. 102, 109 (1987); *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414 (1984); *World-Wide Volkswagen*, 444 U.S. at 294. Illinois courts have held that before a court may exercise long-arm Jurisdiction over a nonresident defendant, "there must be some act by which defendant purposefully availed herself of the privilege of conducting activities within the forum state, thereby invoking the benefits and protections of its laws." *Johnson*, 244 Ill. App. 3d at 388, 614 N.E.2d at 411, 185 Ill. Dec. at 277 (citing *World-Wide Volkswagen*, 444 U.S.

at 297); *Lee Mors*, 791 F. Supp. at 742; *Alpert*, 235 Ill. App. 3d at 459, 601 N.E.2d at 1035, 176 Ill. Dec. at 337. Moreover, unless plaintiff proves that Charter's "conduct and connection with [Illinois] are such that [Charter] should reasonably anticipate being haled into court [here]," then jurisdiction cannot constitutionally be exercised under the long-arm statute. *World-Wide Volkswagen*, 444 U.S. at 297; *see also Asahi*, 480 U.S. at 115 (" '[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field' ") (quoting *United States v. First Nat'l City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting)). The focus of a court's inquiry regarding due process should be " 'the relationship among the defendant, the forum, and the litigation,' " and the main factor in the minimum contacts due process analysis is "foreseeability." *Mors*, 791 F. Supp. at 742 (citation omitted).

B. Section 2-208: General Jurisdiction Under The Illinois Personal Service Statute

Jurisdiction may also be established over a nonresident defendant pursuant to the Illinois Personal Service Statute, which provides in relevant part:

> § 2-208. Personal service outside State. (a) Personal service of summons may be made upon any party outside the State. If upon a citizen or resident of this State or upon a person who has *submitted to the jurisdiction of the courts of this State*, it shall have the force and effect of personal service of summons within this State; otherwise it shall have the force and effect of service by publication.

Ill. Code Civ. P. § 2-208 (West 1992) (emphasis added). This section has been interpreted by Illinois courts to confer personal jurisdiction over a defendant who has conducted business activities within the State unrelated to the cause of action only if such activities are "continuous and substantial." *Huffman v. Inland Oil & Transp. Co.*, 98 Ill. App. 3d 1010, 1016, 424 N.E.2d 1209, 1214, 54 Ill. Dec. 306, 311 (5th Dist. 1981);

see St. Louis-San Francisco Ry. v. Gitchoff, 68 Ill. 2d 38, 44, 369 N.E.2d 52, 54, 11 Ill. Dec. 598, 600 (1977). Under this analysis, also referred to as the "doing business" doctrine, a nonresident defendant is subject to jurisdiction in Illinois if the unrelated activities within the state occur " 'not occasionally or casually, but with a fair measure of permanence and continuity.' "[3] R.W. Sawant, 111 Ill. 2d at 313, 489 N.E.2d at 1365, 95 Ill. Dec. at 501 (citation omitted); *see also Heritage House Restaurants v. Continental Funding Group*, 906 F.2d 276, 283 (7th Cir. 1990) ("Contacts with the forum state that are 'random,' 'fortuitous,' or 'attenuated,' will not be sufficient to establish that exercise of that state's jurisdiction was foreseeable to the defendant."); *Rokeby-Johnson v. Derek Bryant Ins. Brokers*, 230 Ill. App. 3d 308, 318, 594 N.E.2d 1190, 1197, 171 Ill. Dec. 670, 677 (1st Dist. 1992) ("There is no all-inclusive test for determining what activity amounts to 'doing business,' however, the standard is quite high and requires a showing that the corporation is conducting business of such character and extent as to warrant an inference that the nonresident corporation has submitted to the jurisdiction and laws of the State.")

C. Charter Is Not Subject To *In Personam* Jurisdiction Under The Illinois Long-Arm Statute Or The Illinois Personal Service Statute

The assertion of personal jurisdiction over Charter would be inconsistent with the Illinois long-arm and personal service statutes, as well as federal and state due process, because Charter has not had the necessary "minimum contacts" with Illinois. Plaintiff's cause of action is based upon the defendants' alleged manufacture and distribution of asbestos and asbestos-containing products. Because Charter has never engaged in any aspect of the asbestos business, either in Illinois or anywhere else, (Thwaite Aff. ¶ 4), any contact

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[3] Section 2-209(b)(4) is the "doing business" prong under the Illinois long-arm statute.

Charter might have with Illinois would be unrelated to plaintiff's cause of action and therefore must satisfy the standards for general jurisdiction under Illinois' personal service statute. *R.W. Sawant,* 111 Ill. 2d at 313, 489 N.E.2d at 1365, 95 Ill. Dec. at 501. The personal service statute is not satisfied in this case because Charter has not had "continuous and systematic" contacts "with a fair measure of permanence and continuity" with the State. *Id.*

Indeed, the Thwaite Affidavit confirms that Charter has not committed *any* acts in the State of Illinois. (Thwaite Aff. ¶ 6). Charter has never been registered or qualified to do business in Illinois, and it has never maintained an office in Illinois. No director, officer, or employee of Charter has ever resided or conducted business in Illinois. Charter has never owned or leased real property, maintained a post office box or telephone, or advertised in the State of Illinois. Charter has never had a registered agent for service of process here, and it has never paid taxes or franchise fees or commenced a lawsuit in Illinois. (*Id.*)

Under these circumstances, the exercise of jurisdiction over Charter would offend all notions of " 'fair play and substantial justice.' " *Buxton*, 657 N.E.2d at 710, 212 Ill. Dec. at 509 (citation omitted). This is particularly true in Charter's case because Charter is the resident of a foreign country, and "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *Asahi*, 480 U.S. at 114; *see also Buxton*, 657 N.E.2d at 710, 212 Ill. Dec. at 509 (noting that "inconvenience may at some point become so substantial as to achieve *constitutional* magnitude") (quoting *Burger King,* 471 U.S. at 483 n.26) (emphasis in original).

Hence, because Charter is a United Kingdom corporation which has never engaged in any aspect of the asbestos business, and because Charter has never done business and is not doing business in this forum, jurisdiction cannot constitutionally be asserted over Charter.

II. CHARTER IS NOT THE ALTER EGO OF CAPE OR OF CAPE'S SUBSIDIARIES

Plaintiff may contend that Charter is subject to jurisdiction on an alter ego theory by virtue of Charter's previous investment relationship with Cape. However, as numerous Illinois courts have held in previous litigation involving Charter, and as shown in the accompanying Thwaite Affidavit and the discussion below, the "corporate veil" of Cape and its subsidiaries cannot be pierced to hold Charter subject to jurisdiction in Illinois. Cape and its subsidiaries are completely separate and independent entities, and the corporate integrity of each of those companies has always been respected by Charter. Thus, this theory of jurisdiction would also be unavailing.

A. Illinois Courts Pierce The Corporate Veil Only Under Exceptional Circumstances

Under Illinois law, piercing the corporate veil is an extraordinary remedy to be granted only "in those exceptional circumstances where to adhere to the fiction [of separate corporate legal entities] would sanction a fraud or promote injustice." *B. Kreisman & Co. v. First Arlington Nat'l Bank of Arlington Heights*, 91 Ill. App. 3d 847, 850, 415 N.E.2d 1070, 1072, 47 Ill. Dec. 757, 759 (2d Dist. 1980). In fact, under Illinois law, in order to pierce the corporate veil a plaintiff must demonstrate that: (1) there is "such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist;" and, as stated, *supra*, that (2) "adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice." *Alpert*, 235 Ill. App. 3d at 460, 601 N.E.2d at 1036, 176 Ill. Dec. at 388; *see also Great Lakes Overseas, Inc. v. Wah Kwong Shipping Group*, 990 F.2d 990, 996 (7th Cir. 1993). A plaintiff seeking to pierce the corporate veil has a heavy burden, then, because "[a] corporate entity will be disregarded and the veil of limited liability pierced" only where a fraud has been perpetuated, and to do otherwise "would . . . present an obstacle to the protection of private rights or where the corporation is merely the . . . business conduit of a governing or dominating personality." *Alpert*, 235 Ill. App. 3d at 460, 601 N.E.2d at 1036, 176 Ill. Dec. at 338. Thus, the fact that the subsidiary is wholly owned and shares officers with the parent are not alone a sufficient basis for exercising *in personam* jurisdiction over a parent where jurisdiction exists over the subsidiary. *Betar v. De Havilland Aircraft of Canada Ltd.*, 80 F.R.D. 400, 401 (N.D. Ill. 1977), *rev'd on other grounds*, 603 F.2d 30 (7th Cir. 1979), *cert. denied*, 444 U.S. 1098 (1980); *accord Graco, Inc. v. Kremlin, Inc.*, 558 F. Supp. 188, 191 n.3 (N.D. Ill. 1982) ("common directors and officers of a parent and its [wholly owned] subsidiary is not enough, by itself, to confer jurisdiction over a nonresident parent corporation"); *See also Main Bank of Chicago v. Baker*, 86 Ill. 2d 188, 204-05, 427 N.E.2d 94, 101, 56 Ill. Dec. 14, 21 (1981) (neither stock ownership nor common officers and directors alone creates an *alter ego* relationship, as "[t]hese practices are common and exist in most parent-subsidiary relationships"). Instead, the nature or degree of the dominance that must be shown in order for a subsidiary to be considered the *alter ego* or a "mere department" of its parent has been characterized as actual and pervasive "control" over the subsidiary's daily operations. *See Betar*, 80 F.R.D. at 401 ("[t]he maintenance of separate records, separate offices and a *Bona fide* business purpose "control" a court's determination of whether the corporate structure is a "fiction").

The principle of corporate separateness is equally applicable to the issue of *in personam* jurisdiction. The United States Supreme Court has long recognized that the activities of a subsidiary do not subject a parent corporation to *in personam* jurisdiction in the state where the subsidiary is located. *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 336 (1925).[4] Moreover, overwhelming authority in

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[4] Under the *Cannon* doctrine, the legal distinction between affiliated corporations is respected where the "corporate separation [is] real [and] not pure fiction." 267 U.S. at 337. In *Cannon*, the Court noted that through complete ownership of the subsidiary's capital stock, the parent "exert[ed]

Illinois establishes that significant stock ownership and overlapping directors are not sufficient to subject a parent corporation to jurisdiction based on the subsidiary's contacts with Illinois. *E.g., Rae Prod. and Chemicals Corp. v. Koch Materials Co.*, No. 93 C 4818, 1995 WL 715884 (N.D. Ill. Dec. 1, 1995) (court declined to exercise jurisdiction over parent, and the holding corporation which owned the parent, based on acts of wholly owned subsidiary within the forum); *Sportmart, Inc. v. Frisch*, 537 F. Supp. 1254 (N.D. Ill. 1982) (court declined to exercise jurisdiction over parent based on acts of subsidiary within the forum); *John O. Butler Co. v. Standard Oil Co.*, 365 F. Supp. 501, 503 (N.D. Ill. 1973) (same).

Rae Prod. and Chemicals Corp. is particularly instructive. Plaintiff in that action filed suit against Elf Aquitaine, Inc. ("Elf") and Elf Petroleum North America, Inc. ("Elf Petroleum"). Elf Petroleum was a holding company wholly owned by Elf. Plaintiff alleged injury based upon the activities of Elf-Asphalt, Inc. ("Elf-A"), an Illinois-based subsidiary wholly owned by Elf Petroleum. Neither Elf nor Elf Petroleum had any contacts with Illinois. In addition, Elf-A operated as a separate corporate entity from Elf and Elf Petroleum. Accordingly, the court concluded that the plaintiff had failed to make a prima facie showing of personal jurisdiction. The court noted in particular that, although Elf-A had a bank account which required an Elf signatory, this fact "does not by itself demonstrate that [Elf] makes the decisions as to what is done with this account," and plaintiff failed to allege sufficient factors to demonstrate total domination of the subsidiary by the parent, or that the subsidiary was an "agent" of the parent. 1995 WL 715884, at *2-3.

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its control both commercially and financially" and dominated the subsidiary "immediately and completely." *Id.* at 335. The subsidiary had been established solely to market the parent's products in North Carolina, a function performed in other states by unincorporated divisions of the parent company. Despite the extensive "control" by the parent over the subsidiary, the Court declined to pierce the corporate veil based on its finding that "[t]he existence of the [subsidiary] as a distinct corporate entity [was] in all respects observed." *Id.*

In another case, *Sportmart, Inc.*, the court dismissed an antitrust complaint against an Italian corporation, Nordica di Franco Giovanni Vaccari & C.S.A.S. ("Nordica-Italy") and its wholly owned subsidiary, Nordica USA, Inc. ("Nordica-US"), for lack of personal jurisdiction, improper venue, and insufficient service of process. Plaintiff argued that Nordica-Italy transacted business in Illinois because it owned 34 percent of a domestic distributor, RNC, Inc. ("RNC"), which admittedly did business in Illinois, and because Nordica-Italy "controlled" RNC during the period covered by the complaint. It further contended that, because Nordica-Italy formed Nordica-US as a "continuation of the ongoing business of RNC with respect to the distribution of Nordica products," 537 F. Supp. at 1258, *alter ego* jurisdiction could be asserted over both Nordica entities. The court refused to exercise *alter ego* jurisdiction over Nordica-Italy based on RNC's sales in Illinois under the federal antitrust jurisdiction statute, notwithstanding that antitrust jurisdiction may be exercised more broadly than jurisdiction under the Illinois long-arm statute. *Id.* at 1256 n.3. This result was due to the separateness of the corporate entities:

> Although Nordica-Italy monitored RNC's financial records and performance activity, it did not participate in such operating decisions as reviewing sales policies and prices, warehousing, salaries and promotions, or collection of accounts receivable and inventory according to the second affidavit filed by Giovanni Vaccari, a director and officer of the Italian company. . . . Even a parent corporation, let alone a minority shareholder, is permitted to engage in "limited inter-organizational activities such as record reporting or monitoring" without destroying its corporate separateness for jurisdictional purposes. *Tiger Trash v. Browning-Ferris Indus.*, 560 F.2d 818, 823 (7th Cir. 1977), *cert. denied,* 434 U.S. 1034 (1978).

Id. at 1259 n.7.

In *John O. Butler Co.*, the court, applying *Cannon*, declined to exercise jurisdiction over the parent corporation when the facts revealed that the parent and its subsidiary were separately incorporated and, while the directors overlapped, each board was distinct and included some members not found on the other entity's board. Board meetings were held separately, and separate minutes were kept. Each business had its own name and conducted its business under its own letterhead. The subsidiary had its own inventory and manufacturing facilities, a separate payroll, and each company paid its taxes separately. All transactions between the parent and its subsidiary were formally entered into separate ledgers and other corporate formalities were observed. 365 F. Supp. at 503. Under these circumstances, the court held that the *Cannon* test had been satisfied and that jurisdiction was lacking over the parent. *Id.*

Finally, under Illinois law, where a nonresident parent acquires shareholder control of an entity already engaged in an established business in the forum and remains passive with respect to the subsidiary's management, finances and operations, then the parent will not be regarded as the subsidiary's *alter ego*. Thus, in *Connelly v. Uniroyal. Inc.*, 55 Ill. App. 3d 530, 370 N.E.2d 1189, 13 Ill. Dec. 162 (1st Dist. 1977), *aff'd in part and rev'd in part*, 75 Ill. 2d 393, 389 N.E.2d 155, 27 Ill. Dec. 343 (1979), *cert. denied*, 444 U.S. 1060 (1980), the Illinois Court of Appeals refused to find a domestic parent vicariously liable for the tort of its foreign manufacturing subsidiary even though, at the time of the commission of the tort, the parent owned 95 percent of the subsidiary's stock, two of the subsidiary's directors were directors, officers or employees of the parent, and the product carried the parent's trademark. In concluding that the subsidiary was never operated as a "mere instrumentality" or *"alter ego"* of the parent, the court noted especially that the subsidiary had conducted the same business which had resulted in the plaintiff's injury "long before [the parent's] acquisition of its stock," and that the parent never participated in the manufacture of the subsidiary's products. *Id.* at 538-41, 370 N.E.2d at 1195-97, 13 Ill. Dec. at 168-70. The Illinois Supreme Court affirmed the finding with respect to the parent's non-liability. 75 Ill. 2d at 409, 389 N.E.2d at 162, 27 Ill. Dec. at 350.

The court's holding in *Connelly* is particularly applicable here because Cape existed as an independent company for over 70 years before Charter was formed. Moreover, as in *Connelly*, Charter has never participated in Cape's manufacture of products. The only contacts between Charter and Cape were Charter's shareholding interest in Cape and its nominees on Cape's Board of Directors. These contacts are insufficient to render Cape the *alter ego* of Charter, and therefore none of Cape's activities at any time can furnish a basis for this Court's exercise of *alter ego* jurisdiction over Charter.

B. Charter Is Not The Alter Ego Of Cape

An analysis of the relationship between Charter and Cape shows that Cape always has been operationally, financially, and commercially independent of Charter.[5] Thus:

(1) Charter and Cape are engaged in entirely different businesses, their operations are completely separate and they do business from separate offices. (Thwaite Aff. ¶ 17).

(2) All corporate formalities have been observed. (*Id.* ¶¶ 16-20).

(3) Cape was not incorporated by Charter, and is adequately and independently capitalized. (*Id.* ¶¶ 10, 11, 19).

(4) Charter and Cape never had officers or directors in common other than Charter's minority, non-executive representation on Cape's Board (which ceased as of July 18, 1996), and Cape's

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[5] Charter has had no connections of any kind with Cape's operating subsidiaries. (Thwaite Aff. ¶¶ 22-23). Accordingly, in order to prove that Charter is subject to jurisdiction in Illinois, plaintiffs must show (1) that Cape is the *alter ego* of one or more of its former asbestos subsidiaries and that one or more of those subsidiaries is subject to jurisdiction in Illinois, and (2) that Charter is the *alter ego* of Cape. For the purposes of this motion only, Charter assumes *arguendo* that a former asbestos subsidiary of Cape is subject to jurisdiction in Illinois and that subsidiary was the *alter ego* of Cape.

Board and management are independent of Charter. (*Id.* ¶¶ 14-16).

(5) Charter has never sought a common corporate identification with Cape. (*Id.* ¶ 20).

(6) Cape and its subsidiaries have never been treated as divisions or "departments" of Charter. (*Id.* ¶¶ 16-20).

(7) Charter has never been involved in the day-to-day management or the business affairs of Cape, and Charter does not pay Cape's operating expenses. (*Id.* ¶¶ 19-20).

(8) Charter has not shared financial or accounting facilities with Cape. (*Id.* ¶¶ 18-19).

(9) As of July 18, 1996, Charter sold all of its Cape shares, and Charter currently has no investment or other relationship with Cape. (*Id.* ¶ 13).

See Graco, 558 F. Supp. at 191 (citing alter ego factors). On the basis of these facts, plaintiff cannot sustain her burden of establishing that Cape is a "mere department" of Charter or that Charter exercises actual and pervasive control over Cape's day-to-day operations. *Betar*, 80 F.R.D. at 401. Moreover, there is absolutely no evidence in this case that Charter abused the corporate form to perpetrate a fraud or injustice, as is required by Illinois law. *Alpert,* 235 Ill. App. 3d at 460, 601 N.E.2d at 1036, 176 Ill. Dec. at 338.

In sum, there is no basis for piercing the corporate veil of Cape to exercise jurisdiction over Charter. Indeed, numerous Illinois courts have determined in the context of previous asbestos litigation against Charter that Charter is not the *alter ego* of Cape. For example, in *Kessinger v. North American Asbestos Corp.*, No. 87-L-120 (11th Cir. McLean County, Ill. Dec. 1, 1988), the court found that Charter was not the *alter ego* of Cape for jurisdiction purposes. (A copy of the court's decision is attached hereto as Exhibit B). In *Mohn v. International Vermiculite Co.*, No. 85-L-16 (7th Cir. Macoupin County, Ill. Oct. 25, 1985), *aff'd*, 147 Ill. App. 3d 717, 498 N.E.2d 375, 101 Ill. Dec. 193 (4th Dist. 1986), *appeal denied,* 106 Ill. Dec. 49, 505 N.E.2d 355 (1987), the Appellate Court for the Fourth District of Illinois affirmed a lower court decision granting Charter's motion to dismiss for lack of personal jurisdiction. (A copy of the court's decision is attached hereto as Exhibit C). Moreover, the Circuit Court of the Eleventh Judicial Circuit granted Charter's motions to dismiss the complaints in three asbestos-related actions, finding that jurisdiction did not exist over Charter based upon Cape's alleged activities within the forum. *Wehmeier v. UNR Indus.*, No. 82-L-80 (11th Cir. McLean County, Ill. Nov. 27, 1985); *Gowen v. Unarco Indus.*, No. 83-L-140 (11th Cir. McLean County, Ill. Nov. 27, 1985); *Lafever v. Unarco Indus.*, No. 84-L-224 (11th Cir. McLean County, Ill. Nov. 27, 1985). (A copy of the court's decision is attached hereto as Exhibit D).

Outside of Illinois, every court to have finally resolved the issue has confirmed that Cape is a completely separate and independent company from Charter, and that the only relationship that has ever existed between Charter and Cape is that of an investor to an investment. *See, e.g., Culbreth v. Amosa (PTY) Ltd.*, 898 F.2d 13, 14-15 (3d Cir. 1990) (Charter does not control Cape) (a copy of which is attached hereto as Exhibit E); *Craig v. Lake Asbestos of Quebec. Ltd.*, 843 F.2d 145, 152 (3d Cir. 1988) ("there is no evidence that Charter's intrusion into Cape's affairs is even 'constant' or day-to day") (a copy of which is attached hereto as Exhibit F); *Dillman v. Celotex*, No. A87-599 Civil (D. Alaska Aug. 22, 1988) (same, applying Alaska law) (a copy of which is attached hereto as Exhibit G); *In re Asbestos Litig. Venued in Middlesex Co.*, No. L-37243-79, slip op. at 34 (N.J. Super. Ct. July 10, 1987) ("Cape's management historically has been fiercely independent and has deliberately maintained an arms-length relationship with Charter") (a copy of which is attached hereto as Exhibit H).[6]

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[6] One court, the Circuit Court for Jones County, Mississippi, recently denied Charter's motion to dismiss for lack of personal jurisdiction. The substance of the court's decision consisted of a single sentence, which

Accordingly, there is nothing in the relationship between Charter and Cape that would justify piercing the corporate veil to exercise jurisdiction over Charter. Cape and its subsidiaries have always been financed, managed, and operated independently of Charter. Neither Cape nor any of its subsidiaries has ever been so dominated by Charter that it has been a "mere department" of Charter, with no separate mind, will, or existence of its own. Indeed, the only relationship that has ever existed between Charter and Cape is that of an investor to an investment. Without more, that relationship is insufficient to support a finding that Cape is the *alter ego* of Charter. Thus, Charter cannot be subjected to *in Personam* jurisdiction in Illinois based on the acts of Cape or Cape's subsidiaries.

III. THIS COURT MAY NOT EXERCISE *IN PERSONAM* JURISDICTION OVER CHARTER BASED UPON THE ACTIVITIES OF ALLEGED CO-CONSPIRATORS

In previous submissions to this Court, plaintiff has contended that jurisdiction may be asserted against Charter based upon the allegation in the complaint that Charter and other defendants conspired to withhold from workers pertinent information relating to the hazards of asbestos. These allegations of conspiracy, however, are an insufficient basis for the exercise of personal jurisdiction over Charter because (1) on their face, they do not properly allege that Charter engaged in a conspiracy; (2) plaintiff has made no showing that the other alleged co-conspirators were Charter's "agents," which is necessary in order to obtain jurisdiction over Charter under a conspiracy theory; and (3) obtaining personal jurisdiction over Charter through bare allegations of a conspiracy violates due process.

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found no facts and applied the incorrect legal standard. Another court in Mississippi previously determined that Charter was not the *alter ego* of Cape for jurisdictional purposes. *A.J. Adams, et al. v. A. W. Chesterton, et al.*, No. 251-95-905 CIV (Cir. Ct. Hinds County, 1st Judicial District) (copy attached as Exhibit I). Other decisions in Illinois and other states holding that Charter is not the alter *alter ego* of Cape are attached as Exhibit J.

A. Plaintiff Fails To Allege A Conspiracy Involving Charter.

The notion of a conspiracy-based theory of jurisdiction has been criticized by courts construing Illinois law. *See Chromium Indus. v. Mirror Polishing & Plating Co.*, 448 F. Supp. 544, 552 (N.D. Ill. 1978); *Davis v. A & J Elecs.*, 792 F.2d 74, 76 (7th Cir. 1986). Nevertheless, in *Green v. Advance Ross Elecs. Corp.*, 86 Ill. 2d 431, 440-41, 427 N.E.2d 1203, 1208, 56 Ill. Dec. 657, 662 (1981), the Illinois Supreme Court accepted such a theory, subject to several important limitations.

In order to successfully plead a conspiracy theory of jurisdiction in Illinois, a plaintiff must demonstrate (1) the existence of an actionable conspiracy; and (2) a substantial act in furtherance of the conspiracy performed in the forum state by one of the conspirators. *Textor v. Board of Regents of N. Ill. Univ.*, 711 F.2d 1387, 1392-93 (7th Cir. 1983). In order to assert jurisdiction over a defendant who did not itself have contacts with the forum state, the act in the forum state must have been committed by a co-conspirator acting as that defendant's agent. *Green*, 86 Ill. 2d at 441, 427 N.E.2d at 1208, 56 Ill. Dec. at 662.

An allegation of conspiracy for jurisdictional purposes requires the plaintiff to allege detailed facts that the conspiracy existed.[7] "[T]he bare allegation of the existence of a conspiracy does not constitute an actionable wrong upon which liability for damages may be found." *Hume & Liechty*

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[7] That a conspiracy must be pleaded with particularity in order to establish jurisdiction is consistent with the general rule that "[t]he factual basis for assertion and existence of jurisdiction over the person of a nonresident defendant depends upon the allegations of facts in the complaint before th[is] court." *First Nat'l Bank of Chicago v. Screen Gems, Inc.*, 40 Ill. App. 3d 427, 433, 352 N.E.2d 285, 290 (1st Dist. 1976). Failure to include allegations of a nonresident corporation's acts upon which an Illinois court can base jurisdiction is fatal to a complaint. *Reeves v. Baltimore & Ohio R.R. Co.*, 171 Ill. App. 3d 1021, 526 N.E.2d 404, 122 Ill. Dec. 145 (1st Dist. 1988); *see also Heller Fin. v. ConagLa. Inc.*, 166 Ill. App. 3d 1, 520 N.E.2d 922, 117 Ill. Dec. 571 (1st Dist. 1988).

Veterinary Assocs. v. Hodes, 259 Ill. App. 3d 367, 369, 632 N.E.2d 46, 48, 197 Ill. Dec. 977, 979 (1st Dist. 1994); *see Dymek v. Nyquist*, 128 Ill. App. 3d 859, 469 N.E.2d 659, 83 Ill. Dec. 52 (1st Dist. 1984) ("ultimate facts must be pled" by a plaintiff alleging conspiracy). In addition, "[i]t is not true that if one conspirator is subject to Illinois jurisdiction so are all the others." *Green*, 86 Ill. 2d at 440, 427 N.E.2d at 1208, 56 Ill. Dec. at 662. Indeed, the Northern District of Illinois, applying the Illinois long-arm statute, recently held that:

> The cases are unanimous that a bare allegation of conspiracy between the defendant and a person within the personal jurisdiction of the court is not enough. Otherwise plaintiffs could drag defendants to remote forums for protracted proceedings even though there were grave reasons for questioning whether the defendant was [actually] suable in those forums.

Ahmed v. Quinn, No. 95 C 6673, 1996 WL 388418, at *4 (N.D. Ill. July 9, 1996) (quoting *Stauffacher v. Bennett*, 969 F.2d 455, 460 (7th Cir. 1992) (applying the Wisconsin long-arm statute)). The *Ahmed* court found that plaintiff failed to allege facts sufficient to find jurisdiction over the defendant based on an unsubstantiated allegation of conspiracy.

Herein, the conspiracy allegations against Charter are wholly conclusory. *See* Complaint, Count 10, ¶ 15). The complaint fails to allege a single fact linking Charter to any conspiracy. Indeed, plaintiff's conspiracy allegations may in fact be designed to mislead the Court. The conspiracy counts first name seven defendants, including Charter. Only four of those defendants, however, are designated as "Co-Conspirators." (Complaint at 11-12). Charter is *not* included in that group. (*Id.*). Plaintiff then proceeds to lump together "Defendants and Co-Conspirators" in allegations concerning their knowledge of the hazards of asbestos and the effect that general knowledge of those dangers would have had on the asbestos industry. No facts are alleged which suggest that Charter in particular had any knowledge of the alleged conspiracy. Thus, the conspiracy allegations fail on their face to establish personal jurisdiction over Charter.

The courts' analyses in *Alpert, supra,* and *Kutner v. DeMassa*, 96 Ill. App. 3d 243, 421 N.E.2d 231, 51 Ill. Dec. 723 (1st Dist. 1981), are particularly relevant to plaintiff's conspiracy theory. In both cases, jurisdiction hinged upon the defendants' participation with "conspiracies." In both cases, the plaintiff submitted affidavits which made vague, unsubstantiated conspiracy allegations. Specifically, in *Kutner,* plaintiff merely alleged, in conclusory fashion, that certain co-conspirators, acting as defendant's agents, perpetrated a tort within the forum. 96 Ill. App. 3d at 243-45, 248, 421 N.E.2d at 232-33, 235, 51 Ill. Dec. at 724-25, 727. Plaintiff failed to plead any facts which demonstrated that an agency relationship existed between the alleged co-conspirators and the defendant, or that the defendant "agreed, schemed, or conspired" to injure the plaintiff. In contrast, the defendant submitted an affidavit in direct contradiction of the plaintiff's conspiracy allegations. "If a defendant's affidavit contesting jurisdiction is not refuted by a counteraffidavit filed by the plaintiff, [who has the burden of proving jurisdiction, then] the facts alleged in the defendant's affidavit are accepted as true." *Id.* Accordingly, based upon the plaintiff's vague assertion of conspiracy, the court denied jurisdiction over the defendants. *Id.* at 249, 421 N.E.2d at 236, 51 Ill. Dec. at 728. The court in *Albert* reached the same conclusion where the defendants, in response to charges of conspiracy in a defamation claim, submitted affidavits specifically denying making the alleged defamatory statements. 235 Ill. App. 3d at 463, 601 N.E.2d at 1038, 176 Ill. Dec. at 340.

Herein, plaintiff has failed to demonstrate any agreement or scheme between the Charter and the other defendants. Instead, as it stands, the plain language of the complaint, which is devoid of any substantive facts and which does not include Charter in the group of "co-conspirators," leads to the inevitable conclusion that plaintiff has not even alleged that Charter participated in a conspiracy. Therefore, plaintiff cannot purport to invoke this Court's long-arm jurisdiction based on a conspiracy theory.[8]

B. Plaintiff Fails To Allege An Agency Relationship Between Charter And The Alleged "Co-Conspirators"

The underlying rationale of the conspiracy theory of jurisdiction under Illinois law is that the "co-conspirators are each others' agents." *Green*, 86 Ill. 2d at 441, 427 N.E.2d at 1208, 56 Ill. Dec. at 662; *see also* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1069, at 410-11 (2d ed 1987). Consequently, it has been found that the Illinois long-arm statute "permits the exercise of personal jurisdiction over a party to a civil conspiracy if a co-conspirator acts within Illinois *as the party's agent*." *Davis*, 792 F. 2d at 76 (emphasis added).

Thus, "[j]urisdiction over a corporation simply does not translate into jurisdiction over those with whom it may have common interests." *Knorr Brake Corp. v. Harbil, Inc.*, 550 F. Supp. 476, 479 (N.D. Ill. 1982). Moreover, the mere existence of a parent-subsidiary relationship, as exists between Charter and Cape, is insufficient by itself to support the exercise of jurisdiction over a parent corporation without the proper contacts with the forum. *Wissmiller v. Lincoln Trail Motosports*, 195 Ill. App. 3d 399, 403, 552 N.E.2d 295, 298, 141 Ill. Dec. 927, 930 (4th Dist. 1990); *In re Schwinn Bicycle Co.*, 192 B.R. 461, 476 (Bankr. N.D. Ill. 1996) ("Even existence of a parent-subsidiary relationship is not sufficient to make the subsidiary the parent's agent for jurisdictional purposes."); *(see also Argument, supra,* Section II at 14-23). Hence, in order to obtain jurisdiction over Charter under a conspiracy theory of jurisdiction, in addition to pleading an actionable conspiracy, plaintiff herein must also demonstrate that an agency relationship existed between Charter and one of the named defendants or co-conspirators. *See Green*, 86 Ill. 2d at 440-41, 427 N.E.2d at 1208, 56 Ill. Dec. at 662 (court declined to exercise jurisdiction over a nonresident defendant based upon conspiracy where plaintiff failed to plead that the named "co-conspirator" had acted as the defendant's "agent"); *Damian Servs. Corp. v. PLC Servs., Inc.*, 763 F. Supp. 369, 372-73 (N.D. Ill. 1991) (same).

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[8] Charter is not asking this Court to rule on the legal sufficiency of plaintiffs pleading. Because Charter is challenging this Court's jurisdiction, Charter cannot at this point seek such a substantive ruling.

To demonstrate agency, a plaintiff must allege sufficient indicia of an agency relationship – i.e., whether intent existed to create an agency relationship; whether the agent acted for the benefit of the principal; and, finally, whether the agent was under the control of the principal. *See generally* HAROLD GILL REUSCHLEIN & WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP §§ 3-5, at 11-13 (2d ed. 1990). Herein, plaintiff has failed to allege either an intent to create an agency relationship, or control of an alleged "agent" by Charter. For example, plaintiff has failed to allege that any of the named defendants or co-conspirators acted under authority from Charter. "An agent's authority can be either actual or apparent, with circumstantial evidence used to establish the existence and extent of the authority." *Damian Servs. Corp.*, 763 F. Supp. at 372. Where authority is not obvious, apparent authority of an agent may exist where a principal, "through his words or conduct, creates a reasonable impression that the agent has been granted authority to perform certain acts." *Id.* This may be demonstrated upon the acts or statements of the principal. *Id.* at 372-73. Plaintiff has failed to plead that *any* of the named defendants or co-defendants were acting under Charter's authority, or for Charter's benefit. Clearly, then, plaintiff has failed sufficiently to plead a conspiracy theory of jurisdiction over Charter, and the case should be dismissed.

C. The Exercise Of Jurisdiction Over Charter Based Upon Plaintiff's Bare Allegations Of Conspiracy Would Be Inconsistent With Due Process

The exercise of jurisdiction over Charter based upon the facts alleged in the plaintiff's complaint would be inconsistent with due process. In general, as a theory of personal jurisdiction, jurisdiction based upon a conspiracy has been criticized for due process concerns, as well as for merging "the jurisdictional issue with the merits." *Stauffacher,* 969 F.2d at 459; *see generally* Ann Althouse, *The Use of Conspiracy Theory to Establish In Personam Jurisdiction: A Due Process Analysis,* 52 Fordham L. Rev. 234, 251-54 (1983)[9] This is because the question of personal jurisdiction is distinct from the question of substantive liability. *Bell v. Hood,* 327 U.S. 678, 682 (1946); *Stauffacher,* 969 F.2d at 460. In addition, as demonstrated *supra,* due process under both the federal and state due process clauses requires the foreseeability of being hailed into court in the foreign forum. *See* Argument, *supra,* Section I at 9-11). Thus, to be consistent with due process, "[t]he facts of each case must always be weighed in determining whether personal jurisdiction would comport with fair play and substantial justice." *Buxton,* 657 N.E.2d at 710, 212 Ill. Dec. at 509. For the reasons stated above, the exercise of jurisdiction over Charter would be fundamentally unfair.

In sum, plaintiff has failed to demonstrate that Charter committed any act in Illinois, that Charter purposefully availed itself of the benefits of Illinois, or that Charter did anything from which it could reasonably anticipate being haled into court in Illinois.

Furthermore, plaintiff's contention that Charter participated in a conspiracy with other named defendants also fails, as there is no allegation that Charter acted in concert with Cape or any of the other named defendants as to the mining, advertising or distribution of asbestos in Illinois, or that any of the named defendants or co-conspirators acted as an agent of Charter within the alleged "conspiracy." Accordingly, Charter has not had any jurisdictional contacts with Illinois, Charter is not the *alter ego* of Cape, Charter is not part of any conspiracy related to Illinois, and, thus, there is no basis for jurisdiction to be exercised over Charter by this Court.

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[9] This theory also runs afoul of the well-settled principle that jurisdictional contacts must be measured with respect to each particular defendant, and may not be assessed based on another defendant's activities. *E.g., Rush v. Savchuk,* 444 U.S. 320 (1980).

Conclusion

For the foregoing reasons, the Complaint should be dismissed as against Charter for lack of *in personam* jurisdiction.

Dated: Chicago, Illinois
November 13, 1996

Respectfully submitted,

WILDMAN, HARROLD, ALLEN & DIXON

By: /s/ David M. Simon
One of the Attorneys for Defendant
Charter plc

John E. Frey
David Simon
Wildman, Harrold Allen & Dixon
225 Wacker Drive
Chicago, Illinois 60606-1229
(312) 201-2000

Of Counsel:
Werner Polak, Esq.
Stephen Fishbein, Esq.
Edwina F. Martin, Esq.
SHEARMAN & STERLING
Citicorp Center
153 East 53rd Street
New York, New York 10022
(212) 848-4000